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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 656.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT,  
AND CHARLES BAKER, PLAINTIFFS IN ERROR,

v8.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF OHIO.

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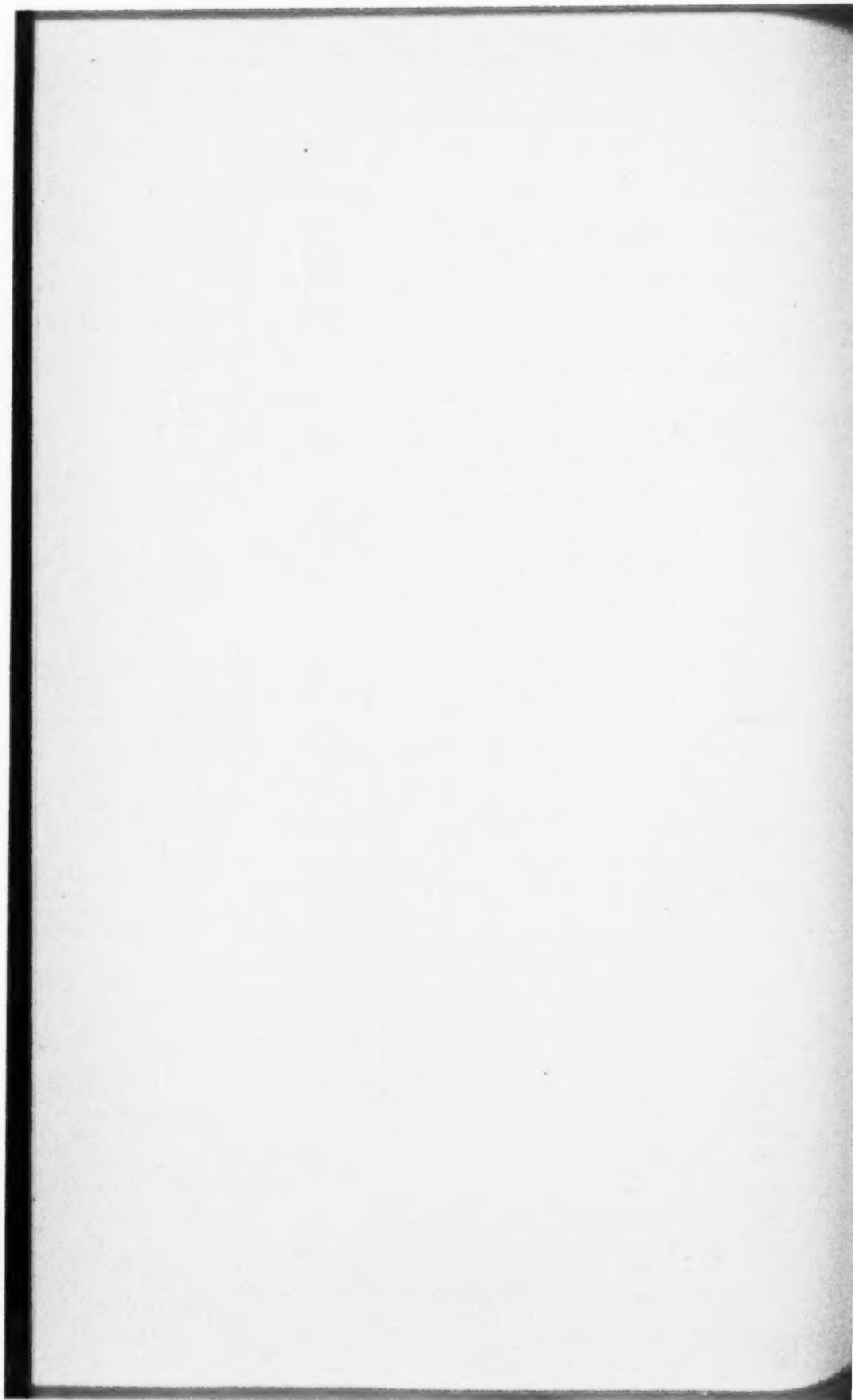
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1 THE UNITED STATES OF AMERICA,  
*Northern District of Ohio, ss:*

At a stated term of the District Court of the United States, within and for the Northern District of Ohio, begun and held at the City of Cleveland, in said District, on the first Tuesday in April, being the third day of said month, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

Present: Honorable D. C. Westenhaver, U. S. District Judge.  
Among the proceedings then and there had were the following, to-wit:

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT and CHARLES BAKER.

Be it remembered that heretofore, to-wit: on the 27th day of June, A. D. 1917, came a Grand Jury of the United States, to wit: A. H. Babcock, E. K. Bebb, Henry Brunner, James W. Butler, Hugh Collins, George F. Copeland, Charles Dreiblebis, D. E. Graver, Charles H. Krauter, John E. Main, James Miers, Charles A. Miner, W. W. McIntosh, Julius Renker, C. K. Russell, Adam, J. Stiefel, Emmet F. Taggart, W. H. Thompson, J. B. Trall, Fred Witt, which said Grand Jury returned an Indictment, endorsed "A True Bill, Emmet F. Taggart, Foreman of Grand Jury," which Indictment is in the words and figures following, to-wit:

2 (Indictment.)

In the District Court of the United States of America for the Northern District of Ohio, Eastern Division, of the April Term, in the year 1917.

No. 3873. Criminal.

NORTHERN DISTRICT OF OHIO,  
*Eastern Division, ss:*

The Grand Jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Ohio, at the April Term thereof in the year 1917, and inquiring for that division and district, upon their oath present that Alphons J. Schue on June 5, 1917, at Cleve-

land, in said division and district, was a male person between the ages of twenty-one and thirty both inclusive, to wit, a male person who then had attained his twenty-first birthday and who did not on that day attain and had not before then attained his thirty-first birthday, and as such person was then and there required, by the Proclamation of the President of the United States dated May 18, 1917, to present himself for and submit to registration, under the Act of Congress approved May 18, 1917, and entitled "An Act to authorize the President to increase temporarily the military establishment of the United States," at the regular registration place in the city of Cleveland, 4th ward, precinct "L" in said division and district, between 7 A. M. and 9 p. m. on said June 5, 1917, that precinct then being the precinct wherein said Alphons J. Schue then had his permanent home and actual place of legal residence, from which he was not then temporarily absent; that said Alphons J. Schue so then and there being such person, unlawfully did wilfully fail and

refuse so then and there to present himself for registration  
3 and to submit thereto as in said Act provided and in said

Proclamation appointed; he the said Alphons J. Schue then and there not being an officer or an enlisted man of the Regular Army, of the Navy, of the Marine Corps, or of the National Guard or Naval Militia in the service of the United States, or an officer in the Reserve Corps or an enlisted man in the Enlisted Reserve Corps in active service; and that Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker each late of Cleveland aforesaid, and each well knowing said Alphons J. Schue to be such person subject to such registration, at Cleveland aforesaid, in said division and district, before and at the time of his so doing, unlawfully did aid, abet, counsel, command and induce said Alphons J. Schue in so unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto as aforesaid, and procure him to commit the offense involved in his so doing; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

E. S. WERTZ,  
*United States Attorney.*

(Endorsement:) No. 3873. District Court of the United States for the Eastern Division of the Northern District of Ohio. The United States vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker. Indictment. For violation of Act of May 18, 1917. A True Bill. E. F. Taggart, Foreman of Grand Jury. E. S. Wertz, U. S. District Attorney. Filed Jun-27, 1917. B. C. Miller, Clerk, U. S. District Court N. D. O.

4      *Challenge to the Array of the Grand Jury and Petit Jury.*

(Filed July 14, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Challenge to the Array of the Grand Jury and Petit Jury.

Come defendants Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, and by leave heretofore granted withdraw their pleas heretofore entered.

Said defendants represent to the Court that they were indicted by the alleged grand jury herein without any sworn charge having been filed against them and without any preliminary examination and therefore had no knowledge or means of knowledge of any criminal proceedings contemplated by said alleged grand jury, and had no opportunity to challenge the array of said grand jury before it was impaneled and sworn.

Said defendants now challenge the array of said alleged grand jury herein, and the array of the petit jury herein, and move the court for an order declaring both panels null and void and the proceedings had by said alleged grand jury null and void, for the defects and errors in the selecting, drawing, summoning, and choosing of said panels and juries, hereinafter set forth, same being prejudicial to these defendants, to wit:

5      1. That the names of all persons selected for jury service in this court were selected and put in the jury-box by two men appointed a commission for that purpose solely on political consideration and because of their prominence in partisan politics as members of the largest two political parties of this judicial district, to-wit, the Republican and Democratic Parties. That defendants are members and officers of the Socialist Party, a minor political party in said district, which was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said members and officers and a part of their propaganda to defeat said Republican and Democratic Parties at the polls and deprive the partisans of said parties, including said commissioners, of political office; that the platforms and principles of said Republican and Democratic Parties are opposed to the platform and principles of said Socialist Party, and said two jury commissioners as partisans of said two

first-named parties, appointed on partisan consideration, are and of necessity must be hostile to and prejudiced against these defendants.

2. That all the names selected and put in the jury-box were names of adherents of said Republican and Democratic Parties exclusively, and did not include the names of any adherents of the Socialist Party to which defendants belong, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist party. That all the persons selected for jury service were and are, by reason of their adherence to said Republican and Democratic Parties and 6 for other reasons, hostile to and prejudiced against these defendants as members of the Socialist Party and against the political propaganda which constitutes the alleged offense of these defendants. That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries will deprive them of their constitutional rights to the equal protection of the law, to justice, to trial by an impartial jury, to due process of law; and will be contrary to Sec. 276 Judicial Code, and contrary to the grant of equal rights under the Act of May 31, 1870, c. 114, sec. 16.

3. That the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of land-owners, property-owners, and capitalists; that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners, and capitalists. That defendants are all proletarians, that is to say, landless and property-less wageworkers, with interests adverse to those of landlords, employers, and capitalists; that the propaganda aforesaid constituting the alleged offense of these defendants advocates the rights of proletarians as opposed to those of landlords, employers, and capitalists, and urges the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury-box. That said jurors so drawn are and of necessity must be by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition. That there were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest, 7 or Profit and would therefore not be rendered hostile to and prejudiced against defendants because of their private interests, but said persons are excluded from said jury service. That to permit defendants to be indicted and tried by juries so selected and drawn will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 of the Judicial Code.

4. That said juries have been selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

5. That the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor re-filled since November, 1916, many months prior to said drawings; that many juries have been drawn from said box since said November, and no evidence is obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, sec. 276. That many of the names now in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who has not held office for more than a year past. That of the persons sitting on said alleged grand jury three (3) had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three (3) had been so selected and their names put in said box by said Sullivan; and said Sullivan's term had expired prior to said drawings; and the names of said six jurors had not been selected and put in the box by either of the persons authorized

8 to do so at the time of said drawings or at the time the order for said drawings was issued. Contrary to Sec. 276 Judicial Code.

6. That the Marshal and his Deputy who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council.

7. That the jury-box used for said drawings was small and rectangular and incapable of being rotated so as to shake together and mingle the names; that there was in fact no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings. That said Clerk did in fact select from said box the names exclusively of adherents of the political parties adverse to that of the defendants and of persons likely to be and in fact hostile to and prejudiced against these defendants. That thereby defendants have been deprived of their constitutional right of due process of law and of trial by an impartial jury of their peers.

8. That *such all* portion of said juries as resided outside the city of Cleveland were summoned by mail; that the actual delivery of the summons in such cases was not by any officer of the court or other qualified person, but by a person unknown, to-wit, a letter-carrier; that twenty-two were thus summoned by mail for said grand jury, and fourteen thereof accepted and sworn; that fifteen 9 were thus summoned by mail for said petit jury. That of said grand jurors so summoned by mail and serving, seven were designated not by their Christian names but by initial only, and the summons mailed not to any street-number but simply to the town or city where such person was believed to reside; that of

the twenty-two thus summoned by mail for the grand jury, three were addressed to towns of which the names were misspelled or which do not exist in Ohio, to-wit: D. E. Graver, "East Claredon, Ohio," Harry J. Griffin, "Copely, Ohio," and P. E. Wigton, "Lucas, Ridge-land County, Ohio" (there being no Ridgeland County within the jurisdiction of this court or in Ohio), and of these one D. E. Gruber (a different name) was sworn in and served. That of the fifteen thus summoned by mail for the petit jury, two were addressed to towns which either do not exist in Ohio or the names of which were mis-pelled, to-wit, H. E. Cogsil, "Kilgour, Ohio," D. W. Millinger, "Leonia, Ohio," and one was addressed as follows, "R. B. Richards, Kent," (without designating any state), there being numerous towns of that name in the United States, notably in Connecticut, Illinois, Indiana, and Iowa; and two were addressed as follows, "A. C. Beels, Burton, Ohio," and "Allen Mills, Burton, Ohio," there being one town named "Burton" in Geauga County, and another town named "Burton City" in Wayne County, and there being no such names, spelt in such manner, among the persons named in the jury-box. Further, that of the fifteen persons summoned by mail for the petit jury, nine are designated not by their Christian names but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to reside. That by reason of the neglect of all safeguards both as to the manner of serving and the summons and the 10 identity of the persons so summoned, defendants are deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District;

9. That there are nineteen counties composing the Eastern Division of the Northern District of Ohio, but that the Clerk in drawing the names for said grand jury did not draw any names from seven of said counties, to-wit, Ashland, Ashtabula, Carroll, Holmes, Medina, Tuscarawas, and Trumbull, but drew six from Cuyahoga; and in the grand jury as accepted nine counties were without representative. That in the drawing of names for said petit jury the Clerk has drawn 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but has not drawn any names from 8 counties within said Division, to-wit, Crawford, Holmes, Lorain, Mahoning, Rich-land, Summit, Tuscarawas, and Trumbull. That this unequal distribution of jurors and failure to select names from large portions of the territory within the District and confining such drawings to only a part of said District, is in violation of Sec. 277 of the Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

10. That both the grand and petit juries were special juries ordered for a special purpose; that by Sec. 281 of the Judicial Code the defendants above named, and that the facts set forth in the form as is required in such cases by the laws of Ohio, but failed so to do.

11. That said grand jury purported to be summoned under See. 284 of the Judicial Code and was summoned before the then acting

11 grand jury had been discharged, but the district attorney failed to certify in writing that the exigencies of the public service required it.

MORRIS H. WOLF,  
JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

STATE OF OHIO,  
*Cuyahoga County, ss:*

Charles E. Ruthenberg, being duly sworn says that he is one of the defendants above named, and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed in my presence by the said Charles E. Ruthenberg this 14th day of July, A. D. 1917.

[SEAL.] MORRIS H. WOLF,  
*Notary Public in and for Said County.*

12 *Amended Challenge to the Array of the Grand Jury and Petit Jury.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

Amended Challenge to the Array of the Grand Jury and Petit Jury.

Come defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and by leave heretofore granted withdraw their pleas heretofore entered.

Said defendants represent to the Court that they were indicted by the alleged grand jury herein without any sworn charge having been filed against them and without any preliminary examination and therefore had no knowledge or means of knowledge of any criminal proceedings contemplated by said alleged grand jury, and had no opportunity to challenge the array of said grand jury before it was impaneled and sworn.

Said defendants now challenge the array of said alleged grand

jury herein, and the array of the petit herein, and move the Court for an order declaring both panels null and void and the proceedings had by said alleged grand jury null and void, for the defects and errors in the selecting, drawing, summoning, and choosing of said panels and juries, hereinafter set forth, same being prejudicial to these defendants, to-wit:

1. That the names of all persons selected for jury service in this Court were selected and put in the jury-box by two men appointed

13 a commission for that purpose solely on political considera-

tion and because of their prominence in partisan politics as members of the largest two political parties of this judicial district, to-wit The Republican and Democratic Parties. That defendants are members and officers of the Socialist Party, a minor political party in said district, which was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said members and officers and a part of their propaganda to defeat said Republican and Democratic Parties at the polls and deprive partisans of said parties, including said commissioners, of political office; that the platforms and principles of said Republican and Democratic Parties are opposed to the platform and principles of said Socialist Party, and said two jury commissioners as partisans of said two first-named parties, appointed on partisan consideration, are and of necessity must be hostile to and prejudiced against these defendants.

2. That all the names selected and put in the jury-box were names of adherents of said Republican and Democratic Parties exclusively, and did not include the names of any adherents of the Socialist Party to which defendants belong, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist Party. That all the persons selected for jury service were and are, by reason of their adherence to said Republican and Democratic Parties and for other reasons, hostile to and prejudiced against these defendants as members

14 of the Socialist Party and against the political propaganda which constitutes the alleged offense of these defendants.

That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries will deprive them of their constitutional rights to the equal protection of the law, to justice, to trial by an impartial jury, to due process of law; and will be contrary to Sec. 276 Judicial Code, and contrary to the grant of equal rights under the Act of May 31, 1870, c. 114, Sec. 16.

3. That the names so selected and placed in said jury-box were taken exclusively or almost exclusively, from the names of land-owners, property-owners, and capitalists; that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners, and capitalists. That defendants are all proletarians, that is to say, landless and propertyless wage-workers, with interests adverse to those of landlords, employers, and capitalists; that the propaganda aforesaid constituting the alleged offense of these defendants advocates the rights

of proletarians as opposed to those of landlords, employers, and capitalists, and urges the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury-box. That said jurors so drawn are and of necessity must be by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition. That there were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest, or Profit and would therefore not be rendered hostile to and prejudiced against defendants because of their private interests, but said persons are excluded from said jury service. That to permit defendants to be indicted and tried by juries so selected and drawn will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 of the Judicial Code.

4. That said juries have been selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

5. That the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor re-filled since November, 1916, many months prior to said drawings; that many juries have been drawn from said box since said November, and no evidence is obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, sec. 276. That many of the names now in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who has not held office for more than a year past. That of the persons sitting on said alleged grand jury three (3) had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three (3) had been so selected and their names put in said box by said Sullivan; and said Sullivan's term had expired prior to said drawings; and the names of said six jurors had not been selected and put in the box by either of the persons authorized to do so at the time of said drawings or at the time the order for said drawings was issued, contrary to Sec. 276 Judicial Code.

16 6. That the Marshal and his Deputy who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council. And said Marshal did not summon nor return the entire venire of thirty (30) names as required by order of the Court and as drawn by the Clerk, but only nineteen (19) thereof.

7. That the jury-box used for said drawings was small and rectangular and incapable of being rotated so as to shake together and mingle the names; that there was in fact no attempt to draw

said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings. That said Clerk did in fact select from said box the names exclusively of adherents of the political parties adverse to that of the defendants and of persons likely to be and in fact hostile to and prejudiced against these defendants. That thereby defendants have been deprived of their constitutional right of due process of law and of trial by an impartial jury of their peers.

8. That all said jurors both inside and outside the City of Cleveland were summoned by mail; that the actual delivery of the summons in such cases was not by any officer of the Court or other qualified person, but by a person unknown, to-wit, a letter carrier.

17. That of the said grand jurors so summoned by mail and serving, seven were designated not by their christian names but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to reside. Further, that of the fifteen (15) persons summoned by mail for the petit jury, nine (9) are designated not by their christian names but by initial only, and the summons mailed not to any street number but simply to the town or city where such person was believed to reside. That by reason of the neglect of all safeguards both as to the manner of serving the summons and the identity of the persons so summoned, defendants are deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

9. That there are nineteen (19) counties composing the Eastern Division of the Northern District of Ohio, but that the Clerk, without an order of the Court directing him to select any parts of said division, in drawing the names for said grand jury did not draw any names from seven of said counties, to-wit, Ashland, Ashtabula, Carroll, Holmes, Tuscarawas, and Trumbull, but drew six from Cuyahoga; and in the grand jury as accepted nine counties were without representative. That in the drawing of names for said petit jury the Clerk, without an order of Court, has drawn 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but has not drawn any names from 8 counties within said Division, to-wit, Crawford, Holmes, Lorain, Mahoning, Richland, Summit, Tuscarawas, and Trumbull. That this unequal distribution of jurors and failure to select names from large portions of the territory within the District and confining such drawings to only a part of said District,

18. is in violation of Sec. 277 of the Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

10. That both the grand and petit juries were special juries ordered for a special purpose; that by Sec. 281 of the Judicial Code the Marshal was required to return them in the same manner and form as is required in such cases by the laws of Ohio, but failed so to do.

MORRIS H. WOLF.  
JOSEPH W. SHARTS.

STATE OF OHIO,  
*Cuyahoga County, ss:*

Charles E. Ruthenberg, being duly sworn, says he is one of the defendants above named, and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed in my presence by the said Charles E. Ruthenberg this 24th day of July, A. D., 1917.

[SEAL.]

MORRIS H. WOLF,  
*Notary Public.*

19 *Answer to the Challenge to the Array of the Grand Jury and the Petit Jury.*

(Filed July 17, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT, and CHARLES BAKER.

Answer to the Challenge to the Array of the Grand Jury and Petit Jury.

Now comes E. S. Wertz, United States Attorney for the Northern District of Ohio, counsel for the United States of America, and for answer in the above entitled cause of action denies each and every allegation of the defendants' challenge to the array of the grand jury and petit jury, and asks that the motion and relief asked for by the defendants herein in their Challenge to the Array of the Grand Jury and Petit Jury, be refused and denied.

E. S. WERTZ,  
*United States Attorney.*

Sworn to before me and subscribed in my presence this 17th day of July, 1917.

[SEAL.]

F. B. KAVANAGH,  
*Notary Public.*

*Motion to Quash.*

(Filed July 18, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

*Motion to Quash.*

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, move the court to quash the indictment herein by reason of defects apparent upon the fact of the record, in this, to-wit:

1. The grand jury which found said indictment was not drawn and impanelled as required by law.

2. Said grand jury was not legally constituted, and was not a lawful grand jury.

3. Said grand jury was not a jury of the State and District as required by law but of only the Eastern Division of said District and was drawn from only a portion of the Counties within said Division, and said selection of Counties was made by the Clerk without an order of the Court indicating from what parts of the District said jury was to be drawn.

4. Said grand jury had not been drawn by name from a jury box containing at the time of said drawing the names of 300 persons; nor had the jury commissioners who were then authorized by law, placed all of the names in said jury box but a large number had — placed therein by one Jeremiah J. Sullivan, whose term of office expired prior to the order of the Court for such drawings.

5. Three of the members of said grand jury had not been selected nor their names put in said jury box by the jury commissioners having authority so to do at the time of the issuing of the 21 order by the court and the said drawing.

6. One D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without anyone of such name having been selected or summoned.

7. Said grand jury was not summoned nor returned by the Marshal in the manner and form required by law, in this, to-wit: He summoned all by mail instead of personal summons, including James W. Butler, Cleveland Heights, Ohio; Hugh Collins, Cleveland, Ohio; Julius Renker, Cleveland, O.; Adam J. Stiefel, Cleveland, O.; Fred Witt, Cleveland, O.; and said Marshal did not summon the entire venire of thirty (30) names as ordered by the Court and

drawn by the Clerk, but selected 19 of said names, as appears by the Record. Said petit jury was not summoned by the Marshal in the manner and form required by law, in this to-wit: He has summoned all of said jury by mail, including the following, purporting to be of Cleveland, Ohio: Guy Booth, William Fleming, W. G. Morris, Herman Schlee and A. H. Weise.

8. Said grand jury had no jurisdiction of the persons of these defendants, and no jurisdiction to inquire into said alleged offense or present an indictment against these defendants therefor.

9. Said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

10. Said indictment was not prepared nor presented by the grand jury in the manner required by law.

11. Endorsements not provided by law, and prejudicial to these defendants, have been placed upon the back of said indictment.

22 12. Said indictment fails to show that the events constituting the alleged offense occurred before the sitting of said grand jury, and before the finding of said indictment.

13. The indictment fails to show that the grand jurors were of the necessary qualifications, were of the body of the State and district, and sitting within the district.

14. Said indictment fails to state that said Alphons J. Schue was a citizen of the United States or a male person not an alien enemy, who has declared his intention to become a citizen, at the time said offense is alleged to have been committed.

15. Said indictment fails to state that said Proclamation had been published at the time said offense is alleged to have been committed by these defendants, or was ever published.

16. Said indictment fails to negative the possible appointments provided for in sub-division third of Sec. 1 of the Draft Act.

17. Said indictment alleges three separate offenses in one count.

18. Said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce, and procure said Schue to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

19. The indictment charges these defendants as accessories instead of principals.

20. Other reasons apparent upon an inspection of the record.

MORRIS H. WOLF,  
JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

23      (*Plea in Abatement, Presented by Defendants for Filing  
Leave to File Being Refused by the Court.*)

In the District Court of the United States for the Northern District  
of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,  
vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT,  
and CHARLES BAKER, Defendants.

Plea in Abatement.

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, say that the United States of America ought not further to prosecute the said indictment against them, because:

1. The names of all persons placed in the jury-box from which have been drawn the names of all the grand jurors and petit jurors herein, were selected and put therein by Jeremiah J. Sullivan, former jury commissioner whose term expired before the juries herein were ordered drawn, by George S. May, the present jury commissioner, both of whom were and are prominent and active members of the Democratic Party, and B. C. Miller, Clerk of the Court, member of the Republican Party; the said defendants are members and officers of the Socialist Party, which is a minor political party in said district and was and is without representation on said commission; the offense charged was, if committed by these defendants, a part of their duties and activities as said Socialist members and officers and a part of the propaganda of said Socialist Party and of said officers and members to defeat the Republican and Democratic Parties at the polls and deprive the partisans of said parties, including said commissioners and said Clerk, of political office; that the

platform and principles of said Republican and Democratic  
24      Parties are opposed to the platform and principles of said  
Socialist Party, and said jury commissioners and Clerk were  
and are because of being partisans of said two first-named parties  
and holding office on partisan consideration and for other reasons  
hostile to and prejudiced against these defendants.

2. All the names so selected and put in said jury box were names of adherents of said Republican and Democratic Parties, exclusively and did not include the names of any adherents of the Socialist Party, to which defendants belong both as officers and members, although there were and are numerous persons in said district qualified to serve on said juries, who are members of the Socialist Party but are excluded from such service by reason of their adherence to said Socialist Party. That all the persons so selected were and are by reason of their adherence to said Republican and Democratic

Parties and for other reasons, hostile to and prejudiced against these defendants and their party, which propaganda constitutes the alleged offense of these defendants. That to permit defendants to be indicted and tried by juries composed exclusively of their political adversaries and from which all members of their own party are systematically excluded, will deprive them of their constitutional rights to equal protection of the law, to justice, to trial by an impartial jury of their peers, and to due process of law; will be contrary to sec. 276 Judicial Code, and the grant of equal rights under Act of May 31, 1870, c. 114, sec. 16.

3. That the names so selected and placed in said jury box were taken exclusively, or almost exclusively, from the names of land-owners, property owners, and capitalists, and employers; that 25 the names drawn and picked from said jury box for the grand and petit juries herein are names exclusively of land-owners, property-owners, capitalists, and employers. Defendants are all proletarians, that is to say landless and propertyless wage-workers, and their interests as such are adverse in many respects to those of said landlords, property-owners, capitalists, and employers; the political propaganda aforesaid constituting the alleged offense of these defendants advocates the rights of proletarians as opposed to those of landlords, property-owners, capitalists, and employers, and urges the abolishment of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and selected. Said jurors so drawn were and are by reason of their said private interests and sources of income hostile to and prejudiced against these defendants and said propaganda. There were and are many thousands of persons in said district qualified to serve on said juries who do not derive their income from Rent, Interest, or Profit and would therefore not be rendered hostile to and prejudiced against these defendants on account of any private interests and sources of income, but said persons are purposely excluded from said jury service. To permit defendants to be tried and indicted by juries so drawn and selected will deprive them of their constitutional rights as above set forth, and be contrary to the spirit, purpose, and letter of Sec. 277 Judicial Code.

4. Said juries have been selected and drawn from only a part of the Northern District of Ohio, instead of from the entire District.

5. The Jury box from which were drawn the names for 26 said juries had not been emptied at any time within recent years, nor re-filled since November, 1916, many months before said drawings; many juries have been drawn since said last refilling, and said box did not at the time of said drawings contain the names of qualified persons numbering 300, as required by law. Many of the names now in said box and at the time of said drawings were selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings. Of the persons sitting on said grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for the petit jury, three had been so selected and their names put in said box by said Sullivan; and the names of said six jurors had not been selected or put in the box by any person authorized so

to do at the time or after the order of Court for said drawings; contrary to Sec. 276 Judicial Code.

6. The jury box used for said drawings was small, rectangular, and incapable of being rotated so as to mingle the names; there was in fact no attempt to draw said names by lot, but the Clerk of the Court, said B. C. Miller, in the presence of the Marshal, one Charles W. Lapp, both of whom are political adversaries of these defendants and opposed and prejudiced against them, selected from said box such names as said Clerk preferred for these proceedings. Said clerk did in fact select from said box the names exclusively of adherents of the Republican and Democratic Parties and likely to be and in fact hostile to and prejudiced against these defendants; in violation of defendants' constitutional rights of due process of law and trial by an impartial jury of their peers.

7. Said Marshal, Charles W. Lapp, and his deputy, who  
27 served the writs of venire for both of said juries were not  
"indifferent persons" as required by law, but active partisans  
and adherents of the Democratic Party and political adversaries of  
these defendants, said Marshal being an active member of the Demo-  
cratic Club of Cleveland, and a former member and president of the  
City Council.

8. Said Marshal did not summon the thirty (30) men for grand  
jury service as ordered by the Court and drawn by the Clerk, but  
selected and summoned nineteen (19) of them.

9. All persons who were summoned for said grand jury and petit  
jury were summoned by mail, including a number who purported to  
be residents of Cleveland, Ohio.

10. Of the petit jurors drawn and summoned, Guy Booth is not  
now a resident of the City of Cleveland as the record purports to  
show; nor of any other place within said District to defendants'  
best knowledge and belief; that Herman Schlee is not now a resi-  
dent of the City of Cleveland, at 3857 West 41st Street, as the Record  
purports.

11. One D. E. Grager was sworn as a grand juror, no such name  
having been drawn from the jury box, nor any one of that name sum-  
moned; and the address of one D. E. Graver, who was summoned by  
mail, purports to be East Clairdon, Ohio, there being no such Post  
Office address in Ohio.

12. All of the grand and petit jurors summoned from addresses  
outside of Cleveland, O., were addressed simply by Town or City  
without Street Number or Post Office box, and almost all were ad-  
dressed by initials instead of their proper names, so that it is prac-  
tically impossible to identify them.

28 13. Nineteen counties compose the Eastern Division of the  
Northern District of Ohio, but the Clerk in drawing the 30  
names for said grand jury drew six (6) from Cuyahoga County alone  
and none from seven (7) counties, to-wit: Ashland, Ashtabula,  
Carroll, Holmes, Median, Tuscarawas, and Trumbull and in the  
grand jury as sworn 9 counties are without representatives. In  
drawing said petit jury, said Clerk, without any order of Court di-  
recting such selection, drew 5 from Cuyahoga, 4 from Columbiana,

and 3 from Ashtabula, but none from 8 counties, in violation of Sec. 277 Judicial Code and of the constitutional right of defendants to be tried by an impartial jury of the State and District.

14. Both said juries were special juries ordered for a special purpose, to-wit, the investigation and trial of cases of violation of the Draft Act; that by Sec. 281 of the Judicial Code the Marshal was required to make return of them in the same manner and form as is required in such cases by the Laws of Ohio; that by the laws of Ohio the return of the Marshal in such cases must show personal summons, not summons by mail; but that the Marshal failed so to do.

15. Said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case.

16. Said grand jurors were not of the necessary qualifications, were not of the body of the State and District, nor properly constituted a grand jury.

And these allegations the said defendants are ready to verify; wherefore they pray judgment, and that by the Court they 29 may be dismissed and discharged from the premises in the said indictment specified.

MORRIS H. WOLF,  
JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

STATE OF OHIO,  
*Cuyahoga County, ss:*

Charles E. Ruthenberg being duly sworn, says that he is one of the above named defendants and that the facts set forth in the foregoing pleading are true as he verily believes.

CHARLES E. RUTHENBERG.

Sworn to and subscribed before me by the said Charles E. Ruthenberg this 17th day of July, A. D. 1917.

[SEAL.]

MORRIS H. WOLF,  
*Notary Public.*

30

*Demurrer.*

(Filed July 18, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

*Demurrer.*

Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, defendants, demur to the indictment herein for the reasons:

- (1.) that the facts set forth therein do not constitute an offense against the laws of The United States;
- (2.) that the indictment charges these defendants with being accessories to a misdemeanor;
- (3.) that it does not allege the events or acts as occurring prior to the finding of the indictment;
- (4.) that it does not allege the indictment to have been presented by a grand jury "duly" empaneled and sworn, and in, of, and for the district;
- (5.) that the said Act of May 18, 1917, entitled: "An Act to Authorize the president to increase temporarily the military establishment of The United States", and the "Proclamation" of same date, are unconstitutional on the following grounds:

- (a) Said act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;
- (b) Said Act deprives men of their liberty without due process of law, in violation of Amendment V of the United States Constitution;
- 31 (c) The Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;
- (d) Said Act violates Article I Section 8 Clause 15 of the United States Constitution;
- (e) Said Act violates Article I Section 8 Clause 16 of the United States Constitution;
- (f) Said Act in Section IV thereof violates Article III Section 1 and Article I Section 8 Clause 9 of the United States Constitution;
- (g) Said Act violates Article II Section 2 of the United States Constitution;
- (h) Said Act violates Article X of the Amendments of the United States Constitution;

(i) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in Preamble to the United States Constitution.

JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

32 *Hearing on Challenge to Array Concluded and Overruled; Defendants' Motion to Quash Heard and Overruled; Leave to Defendants to File Plea in Abatement Refused by the Court; Defendants' Demurrer Heard and Overruled.*

(Entered July 18, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED E. WAGENKNECHT, and CHARLES BAKER.

This day came again the parties at the bar of Court whereupon hearing on the challenge of defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker to the array of Grand and Petit Jurors was resumed and arguments of counsel being concluded, the Court after due consideration overruled the said challenge, to which ruling and order of the Court the said defendants then and there excepted. Whereupon the said defendants Charles E. Ruthenberg, Alfred E. Wagenknecht and Charles Baker having filed their motion to quash the Indictment herein, said motion was duly heard and overruled by the Court, to which ruling the said defendants then and there excepted; thereupon said defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker moved the Court for leave to file a plea in abatement, which request was objected to by the United States Attorney, and refused by the Court, to which ruling and order the said defendants then and there excepted; and the said defendants having by leave of Court filed their demurrer to the Indictment herein, the said demurrer was duly heard by the Court and overruled, to which ruling the said defendants then and there excepted. Whereupon the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker moved the Court for a separate trial, which motion was duly overruled by the Court, to which ruling and order the said defendants having 33 excepted, they were each rearraigned, and each waiving the reading of the Indictment each for plea thereto say they are not guilty in manner and form as they are each by the Indictment therein and thereby charged, and the impanelment of the jury having begun but not concluded further proceedings were continued until tomorrow morning at 9 o'clock.

*Jurors Empaneled and Sworn.*

(Entered July 19, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, accompanied by counsel at the bar of Court, the selection of a Jury being resumed, there came as jurors, Albert H. Currie, John Spaller, Joseph Whitaker, Charles Wood, J. M. Brewer, A. H. Scoville, John H. Wyssen, John T. Guffoyle, R. S. Torbet, Edwin Thomas, R. B. Richards and W. G. Morris, whereupon said jurors being duly empaneled and sworn the trial of this cause commenced. And the said jury having heard all the testimony in chief on behalf of the United States, and the hour of adjournment having arrived, the further proceedings were continued until tomorrow morning at 9:30 o'clock.

*Trial in Progress.*

(Entered July 20, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker accompanied by counsel, and the jury heretofore empanelled and sworn at the bar of Court and the trial of this cause proceeded. And the said jury having heard all the testimony in chief adduced on behalf of the United States, whereupon said defendants moved the Court to arrest the testimony from the Jury and direct a verdict on behalf of the defendants, which motion was argued by counsel and overruled by the Court, to which ruling and order of the Court the defendants then and there excepted. Whereupon testimony on behalf of defendants was begun

and concluded, further proceedings were continued until tomorrow morning at 9:00 o'clock.

36 *Trial Concluded. Jury Charged. Verdict Guilty as to Defendants Ruthenberg, Wagenknecht, and Baker.*

(Entered July 21, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came again the United States Attorney on behalf of the United States and also came the defendants Charles Ruthenberg, Alfred Wagenknecht and Charles Baker, and the Jury heretofore empaneled and sworn, whereupon the trial of this cause proceeded. And the said Jury having heard all the testimony and arguments of counsel and charge of the Court retired to their room in charge of a sworn officer of this Court to deliberate upon their verdict. And now comes said jury into open Court with their verdict in writing, signed by their foreman which verdict reads and *in is* the words and figures following to wit:

"United States of America, Northern District of Ohio, ss April Term, A. D. 1917. The United States, Plaintiff, vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, Defendants. In the District Court of the United States, No. 3873.

*Verdict.*

We, the Jury in this case, being duly impanelled and sworn, do find the Defendants Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker Guilty as they are each by the Indictment therein and thereby charged. Joseph Wittaker, Foreman."

which verdict was by the Clerk of this Court read in the hearing of said jury, when to which they gave their assent.

37 Whereupon the United States Attorney having moved the Court for sentence the counsel for said defendants gave notice in open Court of his intention to file a motion for a new trial and a motion for arrest of judgment, which motions were duly filed and it is now further ordered that further proceedings herein be continued to next Wednesday the 25th day of July, A. D. 1917, and that the recognizance heretofore entered into by said defendants for their appearance here in this Court to answer unto the Indictment herein remains in full force and effect until said 25th day of July, A. D. 1917.

*Motion for a New Trial.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

C. E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER,  
Defendants.

## Motion for a New Trial.

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, by Morris H. Wolf and Joseph W. Sharts, their attorneys and each for himself and jointly move the Court to set aside the verdict rendered herein and to grant a new trial, and for reasons therefor, show to the Court the following:

(a) The Court erred in not requiring the prosecution to file exceptions for an answer or a demurrer to defendants' challenge to the grand and petit jury panels and array; and in refusing to allow defendants to present evidence to substantiate allegations as to the first, second, third, sixth and 7th grounds thereof; and in overruling said challenge.

(b) The Court erred in overruling defendants' motion to quash the indictment and each count thereof.

(c) The Court erred in overruling defendants' "plea in abatement" and refusing to permit same to be filed, and each count thereof.

(d) The Court erred in overruling defendants' demurrer to the indictment and each count thereof.

(e) The verdict is contrary to the law of the case.

(f) The verdict is not supported by the evidence in the case.

39 (g) The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

(h) The Court, upon the trial of the case, excluded competent evidence offered by the defendants.

(i) The Court erred in refusing to direct a verdict of "not guilty" for each and all of the defendants at the close of the government's evidence.

(j) The Court erred in not directing a verdict of "not guilty" for each and all of the defendants at the close of all the evidence.

(k) Newly discovered evidence which defendants were unable to obtain and produce at the time of the trial, is shown by the affidavits filed herewith.

(l) The Court erred in allowing the jury to separate for the lunch hour and to leave the confines of the Court and go upon the streets, after the arguments in the case but before the charge, at a time when great public excitement and political passion reigned, and when it was practically impossible for a juror to be unaffected by the state of the public mind, said time being the day when the draft numbers were being published, and great enlistment activities were prevailing in the immediate vicinity of the Court House.

(m) The Court erred in permitting the attorneys for the prosecution to appeal to the political passions and prejudices of the jurors in their arguments.

(n) Because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

MORRIS H. WOLF,  
JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

40

*Affidavit.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

*Affidavit.*

STATE OF OHIO,

*County of Cuyahoga, ss:*

Before me, a Notary Public, in and for said County, personally appeared Tom Clifford, who being by me duly sworn, says that he is a resident of the City of Cleveland, and a member of the Socialist Party of the City of Cleveland.

Affiant further says that, while going through some files on the 23rd day of July, 1917, in the Socialist Hall on the corner of Sachett Avenue and West 31st Street, which is a hall of one of the branches of the Socialist Party of the City of Cleveland, he, accidentally, discovered, in one of the drawers in a desk at the said hall, an application for membership in the Socialist Party signed by Alphons Schue, which application card has a mark "6th" indicating that it had been presented to the branch on the 6th day of May, 1917, which card is hereby attached.

Affiant further says that he has no means of knowing and did not know, prior to the said finding of the card, that this card or any such card was had or was in any of the files in the said branch of the Socialist Party.

TOM CLIFFORD.

Sworn to before me and subscribed in my presence, by the said Tom Clifford, this 23rd day of July, 1917.

[SEAL.]

MORRIS H. WOLF,  
*Notary Public.*

41 Paid 25¢.

6th.

Application for Membership in the Socialist Party.

6. "I, the undersigned, recognizing the class struggle between the capitalist class and the working class, and the necessity of the working class organizing itself into a political party for the purpose of obtaining collective ownership and democratic administration and operation of the collectively used and socially necessary means of production and distribution, hereby apply for membership in the Socialist Party. I have no relations (as member or supporter) with any other political party. I am opposed to all political organizations that support and perpetuate the present capitalist profit system, and I am opposed to any form of trading or fusing with any such organizations to prolong that system. In all my political actions while a member of the Socialist Party I agree to be guided by the constitution and platform of that party."

Name—Alphons Schue.

Occupation—Machinist.

If a member of a labor organization give name and number.

Street Address, 2208 Elvira St. Ward, 4. City, —. State, —. County, Cuyahoga. Proposed by Carl Perawa. Age, 22. Date, ——, 191—. Citizen (yes or no), Yes.

(Endorsement:)

This applicant was elected a member of Branch —. Local —. Date ——, 191—. ——, See'y. Street Address —. 42 Recorded by City Central Com. ——, 191— or County Central Com. ——, 191—. ——, See'y. Street Address —. Western Printing & Litho. Co., Racine, Wis.

*Motion in Arrest of Judgment.*

(Filed July 21, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendants.

## Motion in Arrest of Judgment.

Now, after verdict against the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and before sentence, come the said defendants in their own proper persons and by Morris H. Wolf and Joseph W. Sharts, their attorneys, and each for himself and jointly move the Court herein to arrest judgment herein and not pronounce the same, for the following reasons, to-wit:

(a) The Court erred in not requiring the prosecution to file exceptions or an answer or a demurrer to defendants' challenge to the grand and petit jury panels and array; and in refusing to allow defendants to present evidence to substantiate allegations as to the first, second, third, sixth and seventh grounds thereof; and in overruling said challenge.

(b) The Court erred in overruling defendants' motion to quash the indictment and each count thereof.

(c) The Court erred in overruling defendants' "plea in abatement" and refusing to permit same to be filed, and each count thereof.

(d) The Court erred in overruling defendants' demurrer to the indictment and each count thereof.

(e) The verdict is contrary to the law of the case.

44 (f) The verdict is not supported by the evidence in the case.

(g) The Court, upon the trial of the case, admitted incompetent evidence offered by the United States.

(h) The Court, upon the trial of the case, excluded competent evidence offered by the defendants.

(i) The Court erred in refusing to direct a verdict of "not guilty" for each and all of the defendants at the close of the government's evidence.

(j) The Court erred in not directing a verdict of "not guilty" for each and all of the defendants at the close of all the evidence.

(k) Newly discovered evidence which defendants were unable to

obtain and produce at the time of the trial, is shown by the affidavits filed herewith.

(l) The Court erred in allowing the jury to separate for the lunch hour and to leave the confines of the Court and go upon the streets, after the arguments in the case but before the charge, at a time when great public excitement and political passions reigned, and when it was practically impossible for a juror to be unaffected by the state of the public mind, said time being the day when the draft numbers were being published, and great enlistment activities were prevailing in the immediate vicinity of the Court House.

(m) The Court erred in permitting the attorneys for the prosecution to appeal to the political passions and prejudices of the jurors in their arguments.

(n) The Court erred in overruling the motion for a new trial.

Because of which said errors in the record herein, no lawful judgment can be rendered by the Court upon the record in this cause.

MORRIS H. WOLF,  
JOSEPH W. SHARTS,  
*Attorneys for Defendants.*

45      *Motions for New Trial and for Arrest of Judgment Overruled; Order of Sentence and Order to Enter into Recognizances.*

(Entered July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day came the United States Attorney on behalf of the United States and also came the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker accompanied by counsel at the bar of Court, and thereupon came on to be heard the motion of said defendants for a new trial, and motion for arrest of judgment which motions after due consideration were each separately overruled by the Court, to which rulings and orders of the Court the said defendants then and there excepted, and the Court now coming to the imposition of sentence each defendant being inquired of whether he had anything to say before sentence was pronounced and the Court receiving the replies of each of the defendants it is ordered that the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, be each confined in the Stark County Workhouse at Canton, Ohio, for a period of One (1) Year from and after the 28th day of July A. D. 1917, to which sentence and order of the Court each of said defendants then and there excepted and gave notice in open Court of their intention to appeal

this cause and filed their petition for a Writ of Error to The Supreme Court of the United States which petition was duly allowed by the Court and said defendants were allowed fifty (50) days within which to prepare and file their Bill of Exceptions, and leave is also granted said defendants to file an Amended Assignment of Errors by the 1st day of August, A. D. 1917.

46 Whereupon on motion of counsel for said defendants, it is ordered that each of said defendants, enter into a recognizance in the sum of Five Thousand (\$5,000.00) Dollars, with sureties to be approved by the Clerk of this Court for their appearance from day to day thereafter pending a hearing upon a Writ of Error to the Supreme Court of the United States and shall surrender themselves to the United States Marshal, and that they shall then and there be present to abide the order and judgment of this Court or the said The Supreme Court of the United States and not depart the Court without leave thereof. Whereupon came the defendant Charles E. Ruthenberg as principal, and Abraham Kerman and Wm. Ruthenberg, as sureties and entered into the required recognizance and also came the defendant Alfred Wagenknecht as principal and Marguerite Prevey and Ernest Bodecker as sureties and entered into the required recognizance and also came the defendant Charles Baker as principal, and A. E. Herig and Otto Greenberg as sureties and entered into the required recognizance.

47 (*Order Approving Narrative Form of Testimony.*)

(Entered August 21, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER.

This day the bill of exceptions in this case was presented to the court, the same having been delivered to the clerk by the excepting party in accordance with Rule 38 of the General Rules of this court, and the adverse counsel having been notified of such delivery and no objections thereto having been filed, the same is allowed and signed, and ordered to be filed in this case.

*Bill of Exceptions.*

(Filed August 21, 1917.)

In the District Court of the United States, Northern District of Ohio,  
Eastern Division.THE UNITED STATES OF AMERICA, Plaintiff,  
vs.ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGEN-  
KNECHT, and CHARLES BAKER, Defendants.

## Bill of Exceptions.

Be it remembered that, on the trial of the above entitled case, in the District Court of the United States for the Northern District of Ohio, Eastern Division, at the April, 1917, term thereof, before Hon. D. C. Westenhaver, Judge of said court, and a jury duly empaneled and sworn, the following proceedings were had:

*Appearances.*

For the Government, Mr. E. S. Wertz, District Attorney, and Mr. Francis B. Kavanagh, and Mr. Joseph L. Breitenstein, Assistant United States Attorneys.

For the Defendants: Mr. Joseph W. Sharts and Mr. Morris H. Wolf.

July 16, 1917—5:00 p. m.

The counsel for defendants presented to the Court a challenge to the array of the Grand Jury and petit jury.

Mr. Wertz: I presume, if the Court please, it will be necessary, inasmuch as that motion is in the form of an affidavit, to offer some testimony.

The Court: My understanding of a challenge is that it is a matter to be tried by the Court and will, of course, be tried upon such evidence as is presented. Naturally, the person filing the motion or challenge would bring forward such evidence, if any, as they saw fit to bring to the attention of the Court in addition to the affidavit itself, and then the Government will bring forward its testimony. That, I understand, is the practice, Mr. Sharts.

Mr. Sharts: If your Honor please, there has been nothing filed by the District Attorney's office, either in the way of a demurrer or as an exception or an answer, and for that reason we have been unable to understand that an issue had been made up.

The Court: No issues are required. No answer is required. No exception is required. They may object to the sufficiency of the

affidavit, if they wish to submit it in that way, instead of to present such evidence as they may see fit to present.

Mr. Sharts: If your Honor will permit me, I will take an exception. Enter an exception to the ruling of the Court.

The Court: An exception to what?

Mr. Sharts: An exception to the ruling of the Court that neither an answer or exceptions or a demurrer are required before testimony.

50 Thereupon the defendants, to maintain the issues upon their part, on the challenge to the array, called as a witness in their behalf B. C. MILLER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is B. C. Miller. I am Clerk of the United States District Court of the Northern District of Ohio and have occupied that position since February 1, 1912. During my term of office the Jury Commissioners who have acted in conjunction with me are Jeremiah J. Sullivan, of Cleveland, and George S. May, of Napoleon, Henry County, Ohio. On August 4th, 1916 the resignation of Jeremiah J. Sullivan as Jury Commissioner for the Northern District of Ohio was accepted and George S. May was appointed as Jury Commissioner in his stead. I understand that Mr. Sullivan now resides in Cleveland, Ohio. Mr. May resides in the Western Division of this Court. Mr. May has performed the duties of Jury Commissioner for the Eastern Division since the time of his appointment on August 1, 1916, which was exactly contemporaneous with the resignation of Mr. Sullivan.

I think the last time Mr. Sullivan placed names in the jury box was May 19, 1915. At that time he placed 205 names in the box and I placed 205 names in the box. Since that time, 400 were placed in the box on the 15th of November, 1916, 200 by Mr. May, the Jury Commissioner, and 200 by myself. Since that time neither

51 Mr. May nor myself has placed any names in the box. Since November, 1916, there has been 273 names drawn from the box. From the time the last names were placed in the box by Mr. Sullivan and myself down to the time of its refilling by Mr. May and myself 392 names were drawn from the box, making a total amount of names drawn from the box since Mr. Sullivan's last placing of names therein of 665. At the time Mr. Sullivan last placed names in the box there were 324 names therein.

Q. Now, what were the political principles of Mr. Sullivan?

Mr. Wertz: I object.

The Court: I think that I will sustain the objection to that question, but permit you to put the inquiry in the language of the Statute, as to whether or not he was a member of the dominant political party of politics opposite to that of the Clerk. I think that is the

extent of the legitimate inquiry. I do not believe it is permissible to prove whether he was prohibitionist or republican or democrat, or of any other political faith beyond that it was a faith opposite to that of the Clerk.

Mr. Sharts: Enter an exception to the ruling of the Court.

Q. State, Mr. Miller, if Mr. Sullivan was a member of a political party other than your own at the time that he was Jury Commissioner?

A. He was.

Q. State whether that political party was a principal political party in the District?

A. It was.

52 Q. Can you give the names of the principal political parties in the District?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Exception.

Q. What is your political affiliation?

Mr. Wertz: I object.

The Court: Objection will be sustained.

Mr. Sharts: Enter an exception.

Q. State whether or not Mr. Sullivan was a well known member of a political party opposed to your own?

A. He was.

Q. Can you state how well known?

The Court: Do you think that that is susceptible of an answer, Mr. Sharts?

Mr. Sharts: I would suppose we were entitled to some concrete information on the subject.

The Court: No. I will of my own motion sustain an objection to that.

(Exception by defendants.)

Q. Will you state, Mr. Miller, what were the political affiliations of Mr. May?

Mr. Wertz: I object.

The Court: The objection will be sustained, unless you make your question in the form I indicated a moment ago.

Mr. Sharts: Exception.

Q. State whether or not Mr. May was a member of the principal political party in the District opposing that to which you yourself belonged?

53 A. He is.

Q. State whether or not he was a member of the same political party with Mr. Sullivan?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception, for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic party and that Mr. Miller is a member of the Republican party, and that the Socialist party is without representation on the jury board. This is the ground of exception in the previous questions. I did not know the political affiliations of the men whose names Mr. Sullivan was putting in. I did not know whether or not Mr. May, in his selection of names, was guided by any party affiliations, except that I called his attention to the statute at the time he was appointed, particularly that feature of it. In selecting names myself, I did not allow myself to be guided by the party affiliations of any of the persons that I selected. I do not know that there are any names of socialists in the jury box placed there by myself. I do not know that there are any names of republicans or democrats placed there. As to the names placed in the box by either Mr. Sullivan or Mr. May, I do not know whether they are republicans or democrats.

Q. Do you know whether or not the names of any that are in the box are the names of republicans or the names of democrats?

Mr. Wertz: I object.

54 The Court: I will sustain the objection to that question.

Mr. Sharts: Enter the exception for the same reasons as above.

Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used?

Mr. Wertz: I object.

The Court: I do not think that is a material line of inquiry, Mr. Sharts.

Mr. Sharts: Enter an exception, because we expect to show by this witness that he has made use of the files of the Board of Elections and has drawn therefrom names of partisans of the republican and democratic parties and excluded the names of adherents of the socialist party.

The Court: In view of that tender of proof, I will reverse the ruling and permit the question to be answered.

A. I obtained the names by writing to the Common Pleas Judges of this Division for various Counties, and asking them to send me a list of men in their counties qualified to serve as jurors.

Q. Were the Common Pleas Judges to whom you sent this request members of any political party?

Mr. Wertz: I object.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception, because we expect to show that the Common Pleas judges to whom this witness applied for names were all of them members of the republican and democratic parties and not of the socialist party.

Other names that I used were those of men that I knew personally, a very few, which I selected and put in, and occasionally some name will be suggested to me by some one and I place that name in a drawer and some of those I select and some of them I reject when I come to make up my list.

Q. Do you know in what manner the list of names that were sent to you from the Common Pleas judges, as you have described, had been selected?

A. Not in detail.

Mr. Wertz: I object to the question. It would be hearsay.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception.

Q. Did you, in asking the Common Pleas judges for these lists of names, indicate in any way how they were to be selected or exclude any particular method of selection?

A. I think not, except that they should be "qualified."

Q. What did you mean by the word "qualified"?

A. Whatever the Statute meant by it.

Q. State, if you know, in what way Mr. Sullivan secured his names for the jury wheel, or from what source?

A. I do not know positively.

Q. State, if you know, in what way Mr. May secured his names for the jury box?

A. I do not know that.

55 Q. State if you are personally aware, or if you have by investigation become aware of the property qualifications of the standing in the financial and commercial world, of any of the men whose names have been placed in the jury box by you?

Mr. Wertz: I object.

The Court: The objection to that will be sustained. I do not understand that the law under which we are operating disqualifies any man from being placed in the jury box or to serve on the jury because he has or has not property, and, therefore, the question is immaterial.

Mr. Sharts: Enter an exception on the ground that by this question defendants expect to establish the allegations of the third ground of challenge to the jury array.

Q. State whether or not the names placed in the jury box are the names of land owners, property owners, and capitalists?

Mr. Wertz: Objection.

The Court: The same ruling on that.

Mr. Sharts: Enter an exception on the same ground.

These jurors whose names have been selected are from the Eastern Division and every county in the Eastern Division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out and I cannot tell whether all of the names from one country have been drawn out that have been

put in and the list of names from that county has been exhausted, or whether still some of them are there.

57 I keep a card index record in my office of the list of names of those who are put in the jury box. It is a public record. I think in every instance on that card index I have indicated the Commissioner or myself who placed the name in the jury box. Before the last drawing of jurors for these panels, I think that there were some names in the jury box, as indicated by my card index, which were placed there by Mr. Sullivan. As to whether or not there are any now, I cannot say positively.

Q. I will ask you to go through your card index, if you can, and give us a rough estimate of the proportion of names that are now in the jury box that were placed there by Mr. Sullivan?

A. I can do so.

The Court: I will sustain an objection to that part of it. I think when I have permitted you to establish that there were names there, I have given you the benefit of all that you are entitled to.

Mr. Sharts: Just enter an exception, on the ground that we expect to show by the proportion of names that a considerable number of the names in the jury box now and at the time of the drawing and the order of the Court were names placed there by Mr. Sullivan and that such names are disqualified and that the remaining names would not constitute the required 300.

58 Mr. Wertz: You mean those names were placed there by Mr. Sullivan at the time as Jury Commissioner, Mr. Sharts?

Mr. Sharts: Yes.

At the time of the drawing of the Grand Jury which brought in the indictment in this case, there were four Grand Jurors drawn whose names were placed in the box by Mr. Sullivan. At the time of the drawing of the Petit Jury for this term which is to try this case, there were three of the twenty placed in the box by Mr. Sullivan.

Q. State whether or not the names of the Grand Jurors are representative of all the counties within the Eastern Division of the Northern District of Ohio?

The Court: Are representative?

Mr. Sharts: I mean whether those names are drawn as residents of all of the counties of the Eastern Division.

Mr. Wertz: You mean "drawn"?

Mr. Sharts: Drawn.

Mr. Wertz: I object.

The Court: I will sustain the objection to that. I have a clear conviction that it is not necessary in drawing a Grand Jury that there should be brought out from the box someone from every county in the District. The Clerk could not do that honestly. It would be necessary for him to select the jurymen in order to produce a result of that sort, so that I will sustain the objection.

Mr. Sharts: Enter an exception on the ground that we expect to

59 show by this answer that there was drawn from the jury box a set of names selected by the Clerk from some of the counties in the District and Division and not from the others, and that there was no order by the Court directing him to make such a selection.

The Court: Now, Mr. Sharts, you are making an offer of proof there that the Court probably does not understand and perhaps you did not intend to put it in that way. Do I understand that you are making an offer of proof to show that the Clerk in drawing those names undertook to select names rather than to draw names?

Mr. Sharts: If Your Honor please, we have stated in our seventh objection or challenge that the jury box used for said drawing was small and rectangular, and incapable of being rotated so as to shake together and mingle the names, that there was in fact no attempt to draw said names by lot, that both the Clerk of Court in the presence of the Marshal, both of whom were political adversaries of the defendants and hostile to them, selected from said box such names as said Clerk preferred for these proceedings.

The Court: I want merely to say, Mr. Sharts, that your offer of proof there is an offer of proof entirely outside of any question which the Court ruled upon and is not warranted either by the question or the ruling of the Court.

Mr. Wertz: Perhaps I had better withdraw the objection and let him answer it.

The Court: No, we will take care of it.

60 Q. I will ask the question, then, in this form, or, rather, I will draw the information that I desire in this form: State the character of the jury box that is used for these drawings? About what size and shape is it?

A. It is a box, I would estimate, about ten inches long, maybe twelve inches, about six inches deep and perhaps six inches wide.

As to whether I have rotated the jury box, I have turned it over and from side to side, shaken it up and turned it around, upside down, on the side, the other side, and end to end.

The form in which the names are placed in the box is on small slips of cardboard, probably three inches long and an inch and a half wide.

In the drawing of the grand jury in this case I did rotate the box, in the presence of the Marshal and any one that happened to be in my main office at the time of the drawing. I did not particularly notice anyone there at the time.

I rotated the box when the names were drawn for petit jury service in this term, in that I shook it and turned it over.

The way this jury box is opened for the purpose of drawing the names out is, it is unlocked and the lid is raised on hinges. Then there is an inside cover under this lid with a hole just about large enough for my hand to get in, a circular hole in this inside cover, about three and a half or four inches in diameter. When I drew these names I put my hand in that hole and drew out the names one at a time. The only selection I made was that I felt for a

61 card, and when I felt that I had one card I pulled it out. To my recollection I did not put any names back in the box.

My recollection is that I drew 30 names for grand jury service for the special term that brought in the indictment in this case. I drew 20 names for petit jury service on the last drawing.

62 The marshal of this court is Charles W. Lapp.

Q. And of what political affiliation?

The Court: I will sustain an objection to that.

Mr. Sharts: Enter an exception on the ground that by the sixth challenge we have charged that the marshal and his deputy who served the writs of venire for both of said juries were not "indifferent persons" but active adherents of the democratic party and political adversaries of the defendants, said marshal being an active member of the Democratic Club of Cleveland and a former member and president of the City Council, and we expect to show by this line of questions that he was a political adversary of these defendants at the time he served the writs of venire.

I have the return of the marshal on the venire of the grand jury. It reads as follows:

"THE UNITED STATES OF AMERICA,  
*Northern District of Ohio, ss:*

Received this writ at Cleveland, Ohio, June 16, 1917, and on the same day, a copy was mailed to each of the following, who personally acknowledged summons in writing:

1. A. H. Babcock, Lorain, O.
2. E. K. Bebb, Wayland, Ohio.
3. Henry Brunner, West Park, O.
4. James W. Butler, Cleveland Heights, O.
5. Hugh Collins, Cleveland, O.
6. George F. Copeland, Millport, O.
7. Charles Dreiblebi, West Salem, O.
8. D. E. Graver, East Claridon, O.
9. Charles H. Krauter, Youngstown, O.
- 63 10. John E. Main, Perry, O.
11. James Miera, Everett, O.
12. W. W. McIntosh, Akron, O.
13. Julius Renker, Cleveland, O.
14. C. K. Russell, Painesville, O.
15. Adam J. Stiefel, Cleveland, O.
16. Emmet F. Taggart, Akron, O.
17. W. H. Thompson, Burbank, O.
18. J. B. Trall, Madison, O.
19. Fred Witt, Cleveland, O.

The following named were excused by order of the Court:

1. J. H. Petry, Galion, O.
2. Harry J. Griffin, Copley, O.
3. E. P. Johnson, Middlefield, O."

Then there is one name that has a pencil mark over it—

- “4. Charles A. Miner, Cleveland, O.
5. J. H. Petry, Galion, O.
6. S. W. Warner, Wellington, O.
7. Reed Wilcoxen, Lisbon, O.
8. S. P. Wiseman, Canton, O.

The following named could not be found in my district:

1. Philip Kennedy, Cleveland, O.
2. Rudolph Liebner, Cleveland, O.
3. P. E. Wigton, Lucas, Ohio.

(Signed)

CHAS. W. LAY,  
*U. S. Marshal,*  
By E. E. LAY, *Deputy.*"

I have not as yet the return of the marshal on the petit jury. The venire for the petit jury is customarily issued and delivered to the marshal.

At the time I made the drawing of the names of this venire, I had no order of court directing me to select any certain counties, 64 other than those in the Eastern Division. There is a rule or order to that effect. There is an order or rule of court, rule 30, providing that the drawing shall be done by the Clerk in the presence of the marshal.

Q. I will ask you, in the drawing of the names for the grand jury, how many counties within the Division are not represented by any person residing therein?

Mr. Wertz: I object.

The Court: I will sustain the objection to that because I have a well-defined conviction that the fact that some counties were not represented in the drawing is not a valid objection.

Mr. Sharts: I would just like to call your Honor's attention to the fact that the Judicial Code does not provide for drawing by lot; that is not the manner indicated by the Code. Enter an exception on the ground that defendants expect to show by the answer that there were seven counties not represented by any names in that drawing.

Q. I will repeat the same question with regard to the petit jury, for the purpose of the record. How many counties were unrepresented in the drawing for the petit jury?

Mr. Wertz: I object.

The Court: I sustain the objection.

Mr. Sharts: Exception on the same grounds as before—that we expect to show by the answer of the Clerk that there were eight counties from which no names had been drawn within the Division.

Q. I will ask the Clerk to state how many names were drawn from Cuyahoga County.

35 Mr. Wertz: I object.

The Court: I will sustain the objection.

Mr. Sharts: Enter an exception on the ground that we expect to show that there were five drawn from Cuyahoga County.

Q. How many were drawn from Columbiana County?

Mr. Wertz: I object.

The Court: I sustain the objection.

Mr. Sharts: Exception on the ground that we expect to show there were four drawn from Columbiana County.

Q. How many were drawn from Ashtabula County?

Mr. Wertz: I object.

The Court: The same ruling.

Mr. Sharts: Enter an exception on the ground that we expect to show there were three drawn from Ashtabula County.

#### Cross-examination.

By Mr. Wertz:

At the time the grand jury was drawn which returned the indictments among which was the indictment against the defendants, there were 519 names in the jury box. At the time the petit jury was drawn which is now sitting in this court, at the last drawing, there were 489 names in the jury box. After the petit jury was drawn which is in this court at this time there were 469 names remaining in the jury box. At the time these names were placed in the box and 66 at the different times to which I have testified, the names placed therein by me were from all counties in the District. I did not check up the names of the other commissioner- as to that, and do not know anything about that.

The drawing of both the grand and petit juries under consideration here was public. The present jury box has been in use in the District Court, to my personal knowledge, since the organization of the court as it is now, January 1, 1912. As Clerk of the District Court, going into office January 1, 1912, I received it as a part of the property of the Government from my predecessor.

#### Redirect examination.

By Mr. Sharts:

I cannot state what number of names of the 519 names in the jury box at the time of the drawing of the grand jury were placed in the box by Mr. Sullivan. I cannot state what number of the 489 names in the jury box at the time the petit jury was drawn were placed in it by Mr. Sullivan.

There was no public notice of the drawing. I do not re-call that there was any particular notice except the order of court. The order of court is dated June 15, 1917, and, to my personal knowledge, was signed by the court about half past four on the evening of the 15th

for the drawing of the grand jury, and the jury was drawn on the morning of the 16th. The order to draw the petit jury was signed July 2, 1917, and the jury was drawn on the 3rd of July. I have no personal recollection as to whether it was drawn in the morning.

There was nothing in the order of the court in either instance 67 which directed at what time the jury was to be drawn. I notified the marshal of the orders of the court and as soon as he came in the drawing was made. In the one instance in which I spoke of it as being made the next day, I went to the marshal's office and he had gone home for the day. I notified him of the drawing that he was to attend for that purpose.

The last time I recall that there was an emptying out of the jury box and the replenishing of the names was on February 4, 1912, when there was an order entered by Judge Day directing that the names then in the jury box be withdrawn and that the Clerk and the Jury Commissioners deposit in said box, as provided by law, 400 names of residents of said Division for jury service. There has been none other since.

Mr. Sharts: Now, if your Honor please, I would like to call your attention, before I dismiss this witness, to the fact that we have here the Clerk of the Board of Elections with a card index and we expect to place him on the stand and we want to establish by a comparison between the card index of the Clerk and the card index of the Clerk of Elections that all of the names that went into the jury box at the time of these drawings were the names of republicans and democrats and not of socialists, and I wish, before this witness goes, to make a request for him to produce the card index for that purpose.

The Court: I will not require the witness to produce the 68 card index for that purpose, and I will not receive testimony of the Clerk of the Board of Elections for that purpose.

Mr. Sharts: Enter an exception to the ruling of the court on the ground that we expect to show by the introduction of this testimony that the grounds of our second challenge are true.

The Court: No. What you proposed to show, Mr. Sharts, was that a comparison of the card index kept by Mr. Miller of the names in the jury box with the records of the Board of Elections—I suppose that is for Cuyahoga County, but for any county—would show the names in the card index were democrats or republicans.

Mr. Sharts: The point was simply this: We ourselves have not the list of names. It is possible we might have gone and copied all those names off his card index, but we did not do that. In order to put those names to the Board of Elections, first it will be necessary for us to have the card index to do it with, and I simply asked—

The Court: I am prepared to rule on the assumption that you asked the Clerk to produce the card index showing the list of names in the jury box, and that you proposed to show those names to the Clerk of the Board of Elections, and that you proposed to have the Clerk of the Board of Elections check them and say that the names of those on his card index are democrats and republicans. Now, you may have an offer of proof in that form and I will sustain the ob-

69 jection to it, but where I checked you was that you were proposing to show by the witness that the allegations and statements of a certain specification were true. You stated in your specification a whole lot more than you offered to prove. I do not think you intended to put it in that way but that is the impression you made in my mind.

Mr. Sharts: Does your Honor make it a part of the record, your ruling, so that it will not be necessary—

The Court: Yes, I so rule that you may have an offer to prove that and an exception.

Mr. Wertz: Not as to the entire specification?

The Court: That he asked the Clerk to produce these records, his card index of the names in the box, and that he offered the Clerk of the Board of Elections as a witness to compare those names with the names of the Clerk of the Board of Elections, for the purpose of showing that the names of the Clerk's card index were the names of republicans and democrats, as shown by the records of the Board of Elections. That is, as I understand it, your offer of proof?

Mr. Sharts: Yes.

Mr. Wertz: So far as it applies to Cuyahoga County only.

Mr. Sharts: Will your Honor allow the same record with regard to the other counties?

Mr. Wertz: I object.

70 The Court: Upon that point, of course, you are not in a situation to do that. I fancy you will find, when you go to a lot of the other counties, that there is no such record or classification, but the point is if you are right in your position and I am wrong in my ruling, it will not make you any "righter" or me any "wronger" if you should cover some other counties. I intend to give you the point you are making on the record fully and fairly for what it is worth. You may entertain a different view from the District Attorney as to what it is worth, and I am desirous you should have it put fairly.

Mr. Sharts: Enter our exception to the Court's ruling. For the purpose of a formal record, we wish to place the Clerk of the Board of Elections on the stand.

The Court: All right.

71 Thereupon the defendants, further to maintain the issues on their part, called as a witness, STEPHEN MCNEIL who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Stephen McNeil. I am Deputy Clerk of the Board of Elections in Cuyahoga County. I was subpoenaed to bring with me certain documents and have brought with me a record of all the electors of Cuyahoga County. This record does not contain their political affiliations. We have such a record for each of the 568 precincts.

By the Court: The records I have shows the political affiliations of the electors of Cuyahoga County who voted and registered at party primaries only.

Q. I will ask you to produce the records of the political affiliations of Cuyahoga County—if your Honor will just permit that in that form—

The Court: Does that obtain throughout the entire county?

The Witness: It obtains practically throughout Cuyahoga County.

The Court: They register for State primaries, do they not?

The Witness: No, they do not register. The register center is at Cleveland, or Cleveland, West Park, Rocky River, and Bedford.

The Court: They do not register for state primaries?

The Witness: No, sir.

72 Mr. Wertz: The record is not even complete. He has only those democrats and those republicans who went to the primary to vote.

The Court: I understand that. Mr. Sharts, he has told us now what kind of a record he has. Your request is that I order him to produce them?

Mr. Sharts: Yes.

The Court: If the record were produced by him and the evidence would go to the extent you have announced it and were material, I would so order it, but I refuse to require him to do so on the ground that the record is not material and would not be received. You have your exception.

Mr. Sharts: Enter the exception of the defendants on the ground that we expect to show by this witness and his records that all of the grand and petit jurors who were drawn for jury service in connection with the indictment and the trial in this case and all of the residents of Cuyahoga County whose names were in the jury box at the time of the drawings were and are adherents of the republican and democratic parties exclusively.

Mr. Wertz: I would like to show it is not a complete record but merely a record of such republicans and democrats who voted at the primaries voluntarily, that it is only partial.

The Court: Everybody votes voluntarily.

Mr. Wertz: It is not a list of the electors who are republicans and democrats and he attempts to broaden out his exception to apply to all of the men in the jury box.

73 The Court: If you claim anything for that, I will let you examine him just enough to show the incompetency of the testimony.

Mr. Sharts: Let me point out that, even if this is not a complete list of all the electors in the county, we undertook to show—I think we are very reasonable in assuming that we can—that all whose names are in the list of jurors are there.

Mr. Wertz: That is an awful broad assumption.

The Court: I think that is a very violent inference. I fancy that you will find that not to be true, but I am not going to permit the

time of the court to be taken up with the inquiry over a matter of so little materiality.

Cross-examination.

By Mr. Wertz:

The record that I have brought here or that I have is of the names and addresses of every registered voter, that is, where they have registration centers in Cuyahoga County. That registration does not show their politics. We have a separate registration of those who voted at party primaries. That shows the political affiliation claimed by the elector on the day he registers to vote at that primary. That includes all of Cuyahoga County, and contains the list of all the electors of the political party who voted and participated in the primaries.

The Court: The Court will take judicial notice of the fact that it includes only those who voluntarily registered to participate in the party primaries.

74 Thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf CHARLES W. LAPP, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Charles W. Lapp. My occupation is United States Marshal. I have held that position four years next Sunday. There are five deputies connected with my office for the Eastern Division. The deputy who has charge of the issuing of summons or serving summons in jury matters would be the person that would write the summons, the stenographer of the office. In this case it was Miss Elsie E. Lay. She is a deputy. I was marshal on June 15 and 16 and July 2nd and 3rd of this year. She was a deputy at that time.

Q. What are your political affiliations?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception on the ground that we expect to show that the marshal is as alleged in the sixth ground of challenge, an active adversary of the defendants, also an active member of the Democratic Club of Cleveland and a former member and president of the City Council.

The grand jurors for the April term were summoned as follows: Those outside of the city were summoned by mail in registered letters, for which we get returns from the Postal Department, and those inside of the city were summoned by deputies by hand.

75 Those served by hand were served by one of the deputies, Gauchat, Kelley, Walsh or Boehme. The paper you hand me

is the command to summons a grand jury and has my return upon it. The typewritten return is not correct where it states that summons were mailed to Julius Renker and Adam Stiefel. Those people were summoned by hand. I know that because I have my journal here. Those names were written on there by the deputy before the signature. I did not see the deputies make the service, but I see the papers handed to them and I see them come back with their returns on them. There is not on this paper any return for service by hand on Renker and Stiefel. There is on the official record of my office. No return has been turned in at the Clerk's office as to the service of summons by hand, on this paper.

There has been no return made upon the last twenty names drawn for the petit jury. I have our complete record of how the services were made. There is the return from the Postal Department.

A. C. Beals, Burton, Ohio. Served by mail by registered letter, for which I have the receipt.

Guy Booth, 10605 Kimberly Avenue, Cleveland, Ohio. Service attempted, not found in the district.

R. N. Chamberlain, East Palestine, Ohio. By registered mail. (Indicating on card.)

H. H. Cogsil, Kilgore, Ohio. There is his signature. O. B. Dealing, Medina, Ohio. (Indicating on card.)

Max H. Eaton, East Palestine, Ohio. Signature of Max 76 H. Eaton on a registry return receipt. (Indicating on card.)

William Fleming, not found. That is one of the three which we have here in which no return has been made.

In all cases where registered mail is sent to any one, if the person cannot be found the receipt, together with the letter, is returned to the sender always, so that we have the original summons back in case we mail a letter to a man that is registered and the registry card is not returned with his signature. We then make a return in court of "The within named so and so not found within my District."

In this particular instance it is a man inside of the city. Mr. Fleming is a man that lives in Cleveland and he was not found by the dep'ty when he went to the address given and inquired for him.

B. J. Holden. Mr. Holden's receipt on a return card. (Indicating on card.)

Mr. Carl Kimball is the next. Signature on receipt card. (Indicating on card.)

D. W. Mellinger. There is the signature on the receipt card. (Indicating on card. Received for by Mrs. D. W. Mellinger; received for by his wife.)

Allan Mills is the next one. Received for by Laura Mills. (Indicating on card.)

W. G. Morris is the next one. That is Cleveland. Served by hand.

E. R. Peebles, Ashtabula. Return card signed "E. R. 77 Peebles". (Indicating on card.)

Richards of Kent is the next. Return card signed "R. B. Richards". (Indicating on card.)

Schlaffley of Mt. Eaton. Return card signed "J. J. Schlaffley". (Indicating on card.)

Herman Schles, West 41st Street. Not found. One of the three indicated.

Edwin Thomas, of Winona, Ohio. Return card signed "Edwin Thomas". (Indicating on card.)

Kent M. Wells, Ashland, Ohio. Return card signed "Kent M. Wells". (Indicating on card.)

A. H. Weise, Holyoke Avenue, East Cleveland. Card signed by Anna Weise. (Indicating on card.)

Frank Wise. Card signed "Frank D. Wise, by Harry D. Wise." (Indicating on card.)

That is the entire number.

Beals card was signed by himself, so far as I know. Eaton's card was signed by H. E. Orth.

Allan Mills is supposed to reside in Burton, Geauga County, Ohio. The postal mark on the registration card is Chagrin Falls. Burton, Rural Free Delivery, Geauga County, Ohio, is the correct address.

The address given for A. H. Weise is Holyoke Avenue, East Cleveland. East Cleveland is not a portion of the city of Cleveland. It has upon it the stamp of the post office of Cleveland, Collinwood station.

R. N. Chamberlain's card is signed by R. S. Chamberlain.

There were no summons sent to anyone inside of the city of Cleveland by mail. There never has been since I have been in office.

78 I was present at the time of the drawing of the grand jury that presented the indictment in this case. The drawing took place in the Clerk's office. Mr. Miller was present. Mr. Miller's clerks were present, to my knowledge, and there were attorneys and other people around the counter. I cannot recall anyone else that was there as a witness.

As to the manner in which the names were drawn from the box, as I recall it, I went into Mr. Miller's office, and told him that I was there to be present at the drawing of the jury. He went into his room, got his keys to unlock the jury box and brought the jury box out, set it on the counter, unlocked it, threw back the outside cover, reached his hand into the little hole in the center of the inside cover and drew the names out one by one and I laid them on the counter in rows of ten so that we would know when we got the required number. That was all he did, so far as I know. Several times in reaching down he shook the box or mixed them up, but I do not remember just exactly what. I am positive he took out just twenty names at the last drawing. At the grand jury drawing he took out thirty names, if my memory serves me right. When I was there he drew out the cards, they were laid in rows of ten on the counter, the names and addresses printed on each card. I think in that particular instance I selected them as near as I could afterwards in a package alphabetically and handed them to the stenographer to make a list of, to be signed by the Court and by the marshal. I remember the petit jury drawing. I

79 could not say exactly what time of day the grand jury drawing was made. At the petit jury drawing identically the same thing was done as I have stated. I do not remember that I went that particular time into Mr. Miller's private office to tell him. I think I met him in the hall and we went into the office together and he brought out the jury box and set it down and we went through about the same process that I have described except that I think this last time we drew twenty names. I saw him rotate the box. He rotated it by turning it upside down and sidewise and putting his hand in and stirring up the cards on the inside. I have seen him do that at times. I do not remember just how many times he rotated it at this particular time.

Cross-examination.

By Mr. Wertz:

I have a record of the grand jury showing the manner of service upon the different persons. There were thirty drawn for that grand jury, I think. The return was incorrect in that it showed the names of three residents of Cleveland having been served by mail instead of by personal service. All members of that grand jury outside of the city of Cleveland were served by mail in registered letters, for which we got return receipts. All of the members on the grand jury included in the thirty who were residents within the corporate limits of Cleveland were served by hand. My record shows that absolutely.

Mr. Wertz: I would like to have the record show that the marshal's criminal docket shows that all members of this jury who resided in the city of Cleveland were served by personal service and that those who resided outside of the city of Cleveland were served by registered mail.

By the Court: I have before me the criminal docket of the marshal's office, in which I am required to keep a record of the service, pages 207 and 208 of this docket, docket No. 7.

As to the return to the Clerk in which I say: "Received this writ at Cleveland, Ohio, June 16, 1917, and on the same day a copy was mailed to each of the following, who personally acknowledged summons in writing," which is followed by nineteen names, and then I go on and say: "The following named were excused by order of the court" and following that are eight names, I do not mean by that return that the eight names following the first nineteen names were not served at all. They were served and excused by the court after service. I mean this return to mean that 27 persons were served either by mail or by personal service and that three were not found in the district.

Redirect examination.

By Mr. Sharts:

In the list of petit jurors I have been testifying about there is no A. R. Phees. There is E. R. Peebles. The name on the

registry card is signed "E. R. Peebles." This is the official list of the names that was handed to me from the Clerk's office. The name on there is E. R. Peebles.

Mr. Sharts: I would like to have the card produced.

(Thereafter the card was produced by the Clerk and read "E. R. Peebles.")

81 The record I have read from is copied in my office under my supervision. Not by myself. I do not enter the things in there. The information that is put in there is derived from the returns that the deputies make. It is a record of all the work that we do in the office. Mr. Charles D. Boehme, a deputy in my office, keeps that record.

By the Court: I am required by law to keep a record of all transactions. As to how we identify the persons who apply to the court in answer to the summons by mail, together with the summons sent out we send out a time card, and the man when he comes in to report for jury duty presents the summons and the time card at the desk and we take it for granted that he is the person to whom the letter was sent.

By Mr. Wertz: The docket which I have here is kept under my direction.

82 July 18, 1917—9:00 a. m.

Thereupon the defendants' challenge to the array of the grand and petit juries was argued to the court. The court, upon consideration thereof, overruled the same, to which action of the court the defendants then and there duly excepted.

Thereupon counsel for the defendants presented and filed a motion to quash, which appears as a matter of record herein. Said motion was thereupon argued to the court, and the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Mr. Sharts: If your Honor please, we have now a plea in abatement which we would like to offer.

The Court: Can a plea in abatement be offered under the law after a motion to quash?

Mr. Sharts: I understand the procedure is, first, a motion to quash; next, a plea in abatement and third, a demurrer.

The Court: I supposed a motion to quash would be equivalent to a demurrer and that when a motion to quash was filed and overruled, neither a demurrer nor a plea in abatement was permissible thereafter. You have — inform me on that subject at 1:30.

83 July 18, 1917—1:30 p. m.

Mr. Sharts: If your Honor please, at the close of the morning session you intimated a doubt, or possibly a conviction on your part, that we had waived our right to file a plea in abatement by reason of our motion to quash. I have expended considerable

time this noon in looking up that point. I will admit it struck me rather unexpectedly. I had assumed all along that the federal court in such matters is controlled by the state court practice and I still take that position unless I can find something in the federal practice that is contrary thereto.

The Court: We will hear the matter on your request for leave to file your plea in abatement and objection thereto, if that is satisfactory to counsel.

Mr. Sharts: Yes. We offer our plea in abatement.

Mr. Wertz: If the plea in abatement is allowed to be filed, we would like permission to file a reply in the form of a general denial; also, as to this motion or pleading that was filed yesterday, the challenge to the array, we would like to have leave to file a general denial to that also. They are both sworn to, and as a matter of safety we would like leave to file that.

The Court: Leave will be given as there is no objection.

Mr. Kavanagh: That can be done by a nunc pro tunc order.

The Court: The record can show it as filed. Certainly the Court granted no leave and made no order for filing the challenge.

84 It was just filed as a matter of course by the defendants and appears on the appearance docket. Now, let us have your position, Mr. Sharts.

(Thereupon the matter was argued by counsel.)

The Court: Upon examining this plea in abatement, I perceive that it raises no questions which were not raised by the challenge to the array which was tried by the court, and, on evidence presented, held not to be sufficient. If I am wrong, that is giving you one ground of error.

Mr. Kavanagh: Mr. Sharts says except as to the 15th ground.

The Court: I would not permit under any circumstances evidence to be offered in support of the 15th allegation, nor proof to the contrary. There would be no way of disapproving that except by violating the secrecy of the grand jury room. I was going to say that, if I am wrong, I have given you one ground of error, for which you announced you were looking.

Mr. Sharts: In what form are you refusing it?

The Court: I am going to refuse it on the objection to its filing. I am not going to permit it to be filed and thereby give you the benefit of an additional proposed ground of error.

Mr. Kavanagh: If your Honor please, will you state for the benefit of the record, that there were two objections made by the Government; first, as to the right to file it after having filed the other pleadings, and, second—

85 The Court: I would sustain it upon three grounds, if you wish: first, because it is tendered for the first time at too late a day. Second, because it is tendered after the Court has heard and tried a challenge to the array, both of the grand and petit juries, and this involves, so far as it is sufficient at all, the same grounds. Third, I sustain it on the ground that it is not sufficient in law as a plea in abatement. You may have your exceptions.

Mr. Sharts: Enter the exceptions for the defendants to the ruling of the Court.

Thereupon counsel for the defendants presented and filed, with the permission of the Court, a demurrer on behalf of the defendants, as appears of record herein. Upon consideration thereof, the Court overruled said demurrer, to which the defendants thereupon duly excepted.

Thereupon counsel for the defendants moved the Court for a separate trial for each of the three defendants, Ruthenberg, Wagenknecht and Baker, so as to have them tried as individuals and not all three tried together. Counsel for the Government thereupon objected, and the Court, upon consideration thereof, thereupon denied the motion for separate trials of the defendants; to which action of the court the defendants and each of them thereupon duly excepted.

Thereupon each of the defendants was duly arraigned and each waived the reading of the indictment and entered a plea of not guilty.

86        Thereupon a jury was called and took their seats in the jury box.

During the examination by Mr. Sharts of the jury, in his examination of Mr. CHARLES P. SMITH, who was called on the jury, the following proceedings were had:

By Mr. Sharts:

Q. If the evidence should disclose to you that these men have been conducting this ardent and vehement campaign against the provisions of this draft act, urging its appeal, advising their hearers to bear in mind its unconstitutional features, as they believe, and also urging their opposition to the war in general, and it should develop that a young man hearing them should, even without any direct urging from them, have felt it incumbent upon himself to refuse to register, would that cause you to form an opinion unfavorable to these defendants in this case as to their guilt or innocence?

Mr. Wertz: I object.

The Court: That gets down to the question under the law that I would have to submit to the jury as to whether the natural, necessary, and probable result of what was being done produced the result claimed, and you are putting that question of law to the jurymen to settle in his own mind.

Mr. Sharts: I was calling attention to the fact that supposing this evidence discloses that these men did not urge anyone not to register but did make a vehement protest against the law as a law and thereby a young man was induced, listening to them, to refuse to register, drawing his own conclusions not from what they 87        said but from their opposition to the law, whether this juror under those circumstances would form an opinion as to their guilt or innocence that would be unfavorable.

The Court: In a way, Mr. Sharts, you are rather asking the juror to give his opinion under the evidence and the law in this case. I will sustain the objection to that question.

Mr. Sharts: Enter our exception.

The Court: I am of the firm opinion that in this case, as in others, people must be held to intend the natural, necessary and probable consequences of their acts as proved in the case by the evidence, and it is for the jury to say from the evidence what is the necessary, natural and probable consequence of the acts alleged.

Mr. Sharts: Then let me put the question in this form: Suppose it should develop that these men have made a very ardent and vehement attack upon the law, criticising the law and criticising the president and the government in their public meetings but have advised their hearers to register in spite of the evil features of the law, as they see it, but it should develop that a young man listening to them has been induced thereby to refuse to register, would that affect your view as to their probable guilt or innocence, that circumstance, that they were urging their protest against the draft act?

Mr. Breitenstein: I object to the form of the question.

The Court: I will let him answer that question.

88 The Juror: I think it would influence me against them.

Mr. Sharts: I would like to challenge the juror for cause, if your Honor please.

The Court: I will get a little further information. Mr. Smith, have you formed in your own mind any opinion as to the guilt or innocence of the parties defendant in this case?

The Juror: No, sir.

The Court: Have you any personal familiarity, by hearsay or otherwise, with the alleged offense charged against them and the circumstances under which it was committed?

The Juror: Not much of one. I read some in the paper at the time this took place, something of that.

The Court: Do you remember now distinctly the circumstances and details which you read?

The Juror: No, sir.

The Court: Are you conscious of any bias or prejudice against these defendants or either of them which would influence or control your judgment and opinion as to their guilt or innocence according to the evidence as it may be produced before you and the law as it may be given to you by the Court?

The Juror: No, sir.

89 The Court: I repeat to you again: can you, in your opinion, serve upon this jury and render a verdict of guilty or not guilty according to the evidence as it may be presented and the law as I shall give it to you?

The Juror: Yes, sir.

The Court: I will overrule your challenge for cause.

Mr. Sharts: Enter our exception.

90 During the examination of the jury generally, the following proceedings were had:

Mr. Sharts: Is there any man here that does not know the distinction between the socialists and the anarchists?

Mr. Wertz: I object.

The Court: That is not a proper question.

Mr. Sharts: Is there any man here that does not know there is a very wide distinction between socialists and anarchists?

Mr. Wertz: I object to that.

The Court: I will sustain the objection to that question. I am not going into a discussion of that question.

Mr. Sharts: Enter the exception of the defendants to the ruling of the Court.

(Adjournment to July 19, 1917, 9:00 a. m.)

July 19, 1917—9:00 a. m.

(Examination of the jury resumed.)

(After the examination of the jury for cause was completed by counsel for both parties, the following proceedings were had:

Mr. Sharts: At this point, if your Honor please—I have not had the opportunity to look the point up and I do not know whether it has any merit at all—but I would like to interpose a challenge to the entire array before proceeding further, on the ground that we were certainly misled, not intentionally, by the drawing of the petit jury by the order of the court following the drawing of the grand jury in that we assumed that the petit jury which would try the case was the petit jury drawn following the drawing of the grand jury, and we spent considerable time and money looking up the antecedents of the men to sit on the petit jury, and we are now confronted with a petit jury who are strangers to us entirely. It places us at some disadvantage, and while I doubt if we have a legal right to object to that method of placing a petit jury before us, I would like to interpose a challenge on that ground.

The Court: The drawing was made of additional jurors for this term and the order was made in that form, and, inasmuch as the Court has allowed you wide latitude to inquire as to the qualification or disqualification of the jurymen tendered and there is not disclosed a shadow of objection as to any of the jurymen offered you, I shall overrule the challenge.

Mr. Sharts: Enter the exception of the defendants.

92 Mr. Kavanagh: Will the Court permit the record to show that this was not a drawing for this case but was drawn for additional petit jurors to serve for the term?

The Court: That appears by the record of the Court. The order is in that form.

(Thereupon both parties passed the jury for cause, and thereafter, both parties being satisfied with the jury, the jury was sworn as follows:)

The Court: The Clerk will swear the jury.

The Clerk: You and each of you do solemnly swear that you will well and truly try the issue joined in this case wherein the United States of America by indictment prosecutes Alphons J. Schue, Charles E. Rutherford, Alfred Wagenknecht, and Charles Baker for

violation of the act of May 18, 1917, and a just and true verdict render therein according to the testimony and the law—

The Court: Just a moment. I did not understand that Mr. Schue was on trial in this case.

Mr. Wertz: He plead guilty.

The Court: Then is that a proper form of oath?

The Clerk: I was merely going by the title of the indictment.

The Court: All right.

The Clerk: —and a just and true verdict render therein according to the testimony and the law as it shall be given you by the Court, so help you God.

Mr. Sharts: I would like to interpose an exception to the form in which the announcement was made and the form of the oath.  
93 I mean the announcement regarding Mr. Schue, in the presence of the jury.

Mr. Wertz: We can produce the record.

The Court: You may have your exception.

(Thereupon, after statements of the case to the jury by counsel for the respective parties, counsel for the Government proceeded to put in evidence on behalf of the Government as follows:)

94 Thereupon, the Government, to maintain the issues upon its part, called as a witness in its behalf, ALPHONS J. SCHUE, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Alphons J. Schue. I live at 2208 Elvira Street, Cleveland, Ohio, and on the 5th of June I lived at the same place. I am 22 years old, going on 23. I was 22 years of age the 7th day of last December. I am employed at Johnston & Jennings, Machinist. On June 5th I was employed by the Brown Hoist Company, manufacturers of cranes. I first learned of the conscription or registration law when I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please the act under which this indictment is drawn was passed, if your Honor will remember, on a certain date, and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that, subject to certain restrictions, but the question is not open to objection on that ground. The question is, on the 20th of May and prior thereto, what was his intent and purpose with respect to the registration provisions of that law. The objection will be overruled.

(Exception by defendants.)

95 A. I would have certainly registered if I had not heard about these Socialist peace meetings.

Q. Whom did you hear speak on the 20th of May, if you remember?

Mr. Sharts: I object, if your Honor please. Has the witness by his answer indicated any meeting of any particular date?

The Court: He has not, but the question will lead to that. All of the facts cannot be covered in one question.

Mr. Sharts: I object to the leading form of that question.

The Court: The objection will be overruled.

(Exception by defendant.)

On Sunday, about the 20th of May, 1917, I was in the Public Square in the city of Cleveland. I heard speeches made there on that day. I know Baker spoke.

I heard some speeches on the Public Square on the Sunday following that, the 27th of May. An incident that occurred on the 27th of May that fixes that in my mind was the arrest of Wagenknecht.

Q. Now, do you recall what Baker said on the 20th of May, 1917, in substance, Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say, that you can recall?

A. And he told about the standpoint of the socialist party, the way they voted against conscription, and that it was taken by the local here that all socialists would refuse to register.

96 Q. What is the last part of the answer?

A. That all socialists would refuse to register and induce others, telling them they would have the full support of the socialist party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory I will ask you if you recall that he said anything about himself registering personally?

Mr. Sharts: I object to putting a suggestion like that in the question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance all you remember as to Mr. Baker's speech on the 20th of May at the Public Square; is that correct?

The Witness: Yes sir.

The Court: You may put the question, Mr. Wertz.

(Exception by defendant.)

The Witness: He said he would refuse to register, him being of military age.

Q. Do you know whether or not he did in fact register?

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney, anything in addition to what has already been said that Mr. Baker said on the subject with reference to being shot before 97 registering.

(Exception by defendants.)

A. He said he would rather be shot here as a man than be shot in the trenches of Europe as a dog.

Q. What, if anything, do you recall that he said in connection with the answer you have just given in connection with his registering or not registering?

A. I did not understand you there.

Q. Do you recall anything that he said in connection with his rather being shot, as to what that had to do with his registering or not registering?

A. No sir.

Q. In order to refresh your memory, I will ask you whether or not Baker said anything about the constitutionality of this conscription act?

A. Yes, sir.

Q. What did he say on that subject?

A. He said it is against the Constitution because a man is guaranteed the right of life, liberty and the pursuit of happiness, and a man being forced to do this, it is taking away his liberty and taking away even his life if he is forced and drafted into the trenches.

Q. Do you recall anything else that Baker said on that subject?

A. No, sir.

Q. Now, on the 27th of May, I will ask you if you remember who was the first speaker? That is the Sunday that the arrest was made of Wagenknecht that you testified to a while ago?

98 A. Max Hays.

Q. Do you recall the substance of Max Hays' address at that time or his speech?

A. Yes sir.

Q. What did Max Hays say?

A. About this conscription Max says as it is the law now you have got to abide by the law and the only way to show you are against the law is at the time the election comes around, to throw these people out who voted for this law.

Q. Now, as I understand you, Max Hays advised compliance with this law?

A. Yes, sir.

Q. Who was the next speaker following Max Hays?

A. Wagenknecht.

Q. What did Wagenknecht say in regard to Max Hays' statement that the law should be obeyed that you have just testified to, if anything?

A. He says it don't comply with the standpoint of the socialist party.

Q. That is, Hays' attitude, do you mean?

Mr. Sharts: I object.

The Court: I think the witness is proceeding in order, Mr. District Attorney. Proceed with the rest of your answer.

A. (continued). That ain't complying with the socialist stand-point and that he is not talking for the socialists; that they have taken a very decided stand on this here act of conscription, that all socialists would refuse to register, that it would not be the 99 way Max says, that we do not have to obey this law.

Q. That is, who said that?

A. Wagenknecht said that—we do not have to obey this law.

Q. Do you recall anything else Wagenknecht said at that time?

A. He says up to conscription, up to disobeying or obeying laws, there is two things you can do: you can either disobey the law and go to jail or obey it and eat gravel and dust the rest of your life.

Q. In what connection did he use this last statement, as to the rest of your life, that you can eat gravel and dust all the rest of your life?

A. In what connection?

Q. Yes. What did he mean by that, as you understand?

A. He meant if you would register—

Mr. Sharts: I object to what he meant.

The Court: Yes.

Q. What did he say would happen to you if you registered, if anything?

A. What would happen?

Q. What you could do, if anything, if you registered?

A. If I would register I would be taking the chance of being drafted, being sent to the trenches; they could do with me just the way they wanted, set the Constitution aside, which gives a man the right of freedom; but by refusing I could stand up like a man and say at last to the capitalists that the working man at last had something to say here too.

Q. Now, I want to understand your answer in connection with the two things that you said Wagenknecht said you could do 100 in regard to this conscription act. What were those two things?

A. You can either obey the law and take the chance of being drafted or disobey the law and go to jail.

Q. Now, in what connection did he use that statement about eating dirt and sand, that you have testified to?

A. In connection with just what I have said.

Q. I do not understand you.

A. What is that?

Q. I do not believe the jury understands the answer.

A. In connection with just what I have said. If you are being drafted you are doing just what the capitalists want you to do and they can just force you to do anything then.

Q. Now, do you recall anything else that Wagenknecht said in that speech?

A. I do not.

Q. You say you cannot?

A. No, sir.

Q. In order to refresh your memory, I will ask you if you recall this statement—

Mr. Sharts: I object.

The Court: It is not permissible to put to him the statement that you want to elicit. You may direct his attention generally to the subject, as to whether or not anything was said relating to a given subject, and, if so, to tell what was said.

Q. In order to refresh your memory, I will ask you whether anything was said on the subject of fighting and fighting and fighting, and, if so, what was said?

A. He says: "We will fight and fight and fight until there 101 is no more fight left in us."

Q. Fight what?

A. This here act of conscription.

Q. In order to refresh your memory, I will ask you what, if anything, was said on the subject of protecting socialists who failed to register?

A. Yes sir.

Q. And, if so, what was said?

A. He said that it was the socialists' standpoint that all socialists of military age would refuse to register, as was voted in St. Louis, and all others that would refuse to register would have the full protection of the socialist party.

Q. Do you recall the time you were placed under arrest?

A. Yes, sir.

Q. What, if any, protection did they furnish you?

A. Not a thing.

Q. Now, following the arrest of Wagenknecht on May 27th, who was the next speaker?

A. Ruthenberg.

Q. Do you recall what Ruthenberg said in his speech to you?

The Court: His speech on that occasion.

A. I do not recall exactly but he said something about an act has occurred this afternoon like occurred in Russia.

Q. What is that?

A. An act occurred here this afternoon that has occurred in Russia right along.

Q. Do you recall anything else he said?

A. I recall talking against capitalism.

102 Q. What did he say against capitalism? I do not know that it is important.

Mr. Sharts: I think it is quite important, if your Honor please, that we shall know what—

Mr. Wertz: If you remember.

The Court: Do you wish to withdraw the question?

Mr. Wertz: Yes.

The Court: Of course, if it was a part of the remarks made by Mr. Ruthenberg on the public occasion referred to, it is all entitled to go in. It is not material who brings it out. It can be brought out on cross-examination and the Court would not undertake to control your discretion in doing it.

Mr. Wertz: I withdraw the question.

The Court: All right.

Q. Do you recall anything else that Ruthenberg said on any subject?

A. He said if he was of military age and if he was asked to go he would rather have his body riddled with bullets than to submit to this here registration.

Q. Do you recall anything else that Ruthenberg said?

A. No.

Q. In order to refresh your memory, I will ask you whether anything was said on the subject of opposing this law at the expense of sending every one of its members to jail and, if so, what was said?

The Court: By Ruthenberg, you mean?

Mr. Wertz: By Ruthenberg.

A. He said he would rather—if the members all stick, they 103 would rather all go to jail than to submit to this here law.

Q. I will ask you whether or not you recall anything that was said by Ruthenberg on the subject of newspapers and their hysterical appeals, if anything, and, if so, what was said?

A. That the newspapers are all under one—just like manufactured from one factory, that everything is just the same and it is hard for us to believe anything that we are being told by them.

Q. In order to refresh your memory I will ask you if you recall anything being said about Billy Sunday in connection with the conscription act?

A. No, sir.

Q. In order to refresh your memory I will ask you if you recall anything being said on the subject of having been bludgeoned and forced into the war against our will, and, if so, what was said?

The Court: That is, by Mr. Ruthenberg at the May 27th meeting?

Mr. Wertz: By Mr. Ruthenberg.

A. He said that we have been just like humbugged around, you know, and these here capitalists are the cause of it, and after robbing us of what we produce they even try to ask us to defend what we have been robbed of.

Q. Can you recall anything that Ruthenberg said as to the position of the socialist party in regard to conscription, and, if you do, what do you recall?

A. He says they have taken a very decided standpoint and it was being voted at St. Louis and they re-adopted at the local here and

104 they all refused, every socialist, to register and encourage others not to.

Q. In order to refresh your memory, do you recall whether or not anything was said on the subject of the Thirteenth Amendment to the Constitution of the United States, and, if so, what was said?

A. Yes, sir. He says that it is against involuntary servitude?

Q. What else on that subject, if you recall?

A. I cannot recall nothing.

Q. Do you recall anything that he said in that connection in regard to the attitude of the courts, and, if so, what do you recall?

A. Nothing.

Q. What the courts had to do with this Thirteenth Amendment?

The Court: He says he recalls nothing said by Mr. Ruthenberg at that time on that subject.

Q. Now, do you recall anything that Ruthenberg said on the attitude of the socialist party in Cleveland in regard to this conscription act?

The Court: Has he not already answered that?

The Witness: I have.

Mr. Wertz: I think not, in Cleveland.

The Court: You may repeat what was said on that subject.

The Witness: They re-adopted this here what was in St. Louis, that all socialists refused to register.

Q. In order to refresh your memory, I will ask you if you remember anything he said about what he would do in case he came between the ages provided for in that law?

105 A. He said he would refuse to register, rather have his body riddled with bullets.

Q. I will ask you if he said anything in that connection in the event that the law was amended to cover the age in which he was?

A. Yes, sir. He said if the law gets amended that it takes in his age, he will refuse.

Q. I will ask you if you recall anything that he said upon the question of rather going to jail than to the trenches?

Mr. Sharts: I object. That has, I think, been covered.

Q. If so, what do you recall on that question.

The Court: I will let the question be answered once more.

A. He said he would rather go to jail than go to work and go to the trenches.

Q. Now, Mr. Schue, as the result of these speeches that you have testified to, of Mr. Baker and Mr. Ruthenberg and Mr. Wakenknecht, what conclusion did you reach in your own mind as to registering or not registering?

A. After these speeches I made up my mind not to register, hearing the way it was against the Constitution, which I believed

they knew more than me. I thought it was right and I refused to register.

Q. These are the men here, Ruthenberg, Wagenknecht and Baker? (Referring to defendants.)

A. Yes, sir.

Cross-examination.

By Mr. Sharts:

I was born in Cleveland, Ohio. My mother was born in Germany and my father was born in Alsace, the French part. Both of 106 my parents have been German subjects since 1870. I am a machinist. I am not a member of the Union.

Q. Have you attended other socialist meetings besides those that you have mentioned on May 20th and May 27th?

A. No, sir.

Q. Those are the only meetings that you have attended?

A. Yes, sir.

Q. Did you ever read any socialist literature?

A. No, sir.

Q. Never read any socialist literature, and so the opinion that you formed of what these men were advocating was formed entirely from what you heard on May 20th and May 27th from word of mouth?

A. Yes, sir.

Q. On May 20th down here at the Public Square you said that Baker spoke. Was this meeting of May 27th at the same place?

A. May 27th?

Q. Yes, the same place as May 20th?

A. Yes, sir.

Q. At the Public Square?

A. Yes, sir.

Q. That is to say, Baker spoke on May 20th in the Public Square and Mr. Ruthenberg and Wagenknecht spoke on May 27th in the Public Square?

A. Yes, sir. When Baker spoke, he stood on a stone in the Square about six feet from the Recruiting Office. The Recruiting 107 Office was not put up at that time, I hardly think. It is up there now.

When Mr. Baker was speaking, they said there were about two thousand people there. I am no judge of numbers, I can't say if it is 500 or 100. I will put it at about 500.

During the time Mr. Baker was speaking, there was no interruption. There was a man who introduced Mr. Baker to the crowd. I do not know him. I had never seen Mr. Baker before. I seen him at the meeting. That is the first time I ever saw him. I knew it was Mr. Baker by him being introduced. That light haired fellow there is Mr. Baker. (Referring to defendant Baker.) The man who introduced Mr. Baker was none of these persons (indicating defendants). I have not seen him around the court room and do not see him here now. My eyes are pretty fair.

Mr. Baker spoke between twenty minutes and half a hour, I guess. I believe Mr. Ruthenberg followed him. I was not there all the while steady during Mr. Ruthenberg's speech. I stayed through Baker's speech. After Mr. Baker stepped down and Mr. Ruthenberg got up, I stayed around the Square there for about half a hour or so, just walking around. I was not particularly interested in what was said right there. I had not lost interest. I made up my mind to go home pretty soon. I stayed around about half an hour walking around the Square and went home. During that time I did not meet any one I knew. I went home on the street car. I did not see any one on the street car that I remember. That was about five o'clock, I believe. I took a car on the Public Square.

108 I believe they started speaking about two-thirty. Baker must have spoken between three and four. The first man talked about half an hour or three-quarters of an hour. He talked longer than Baker. The first man was Tom Clifford. I heard all that he said. During the time Tom Clifford was speaking, I stood about six feet away from him. The crowd was right up around Mr. Clifford, and I was a short distance behind the front of the crowd. They were packed in, but you could get out if you wanted to. I recognized Tom Clifford. I heard him talk about three-quarters of an hour. Baker was the next speaker, and talked about twenty minutes. During that time I remember all of this that I have testified that Mr. Baker said. During the time that Mr. Baker was speaking, I did not see any stenographer in the crowd. There must have been about fifty police there, I guess, scattered through the crowd.

While the speaking was going on, the crowd applauded frequently. The speaker interrupted a while until they were through. I can't just say if I did not miss anything that was said because with the applause I could not hear just too good. The applause breaking in now and then drowned out the words of the speaker. That was true about Clifford's speech. There was applause when Baker got up. While he talked during this twenty minutes I think the crowd interrupted him about ten times. About every two minutes they would break into applause. There was pretty loud applause. It was prolonged, I should judge, for about a minute or so. Not each time.

Some were longer than others. There was no roughing in 109 the crowd, only applauding whenever they talked to please them. The crowd seemed to be worked up. It was receiving these remarks pretty warmly and making a good deal of noise to show their approval. During the entire time I was there and on my way home I did not see any one that I knew. I believe I took a Lorain street car that day at the Square. The street cars were running all the time as usual while the speaking was going on, I believe. There was considerable noise from that source there all the time the speaking was going on. In spite of that I believe I heard everything that Baker said.

As to how I know they were talking on May 20th instead of May 18th, for example, I have only attended on Sundays and I can look at the calendar and see what a Sunday is marked. And I ought

to see at what time I can remember when these speeches were. I have not looked on a calendar since then. I have talked with the District Attorney. I told him it was in May, the last or second last Sunday, but I know it was a Sunday. That was the Baker speech. It seemed to me it was the second last Sunday in May, and I talked it over with the District Attorney, and he fixed that date in my memory. There was a meeting earlier than May 20th, the first one that was held in the rain. I could not tell you what day in May that was. I attended that.

As to whether I particularly distinguished what Mr. Clifford was saying from what Baker was saying, the talk was all generally against capitalism and against conscription and registration. I can-  
not recall to my mind that I heard Mr. Ruthenberg talk on

110 May 20th. I am clear about him speaking on the 27th. He may have talked on the 20th, and he may have said some things that I remember on May 20th. Mr. Clifford and Mr. Baker and Mr. Ruthenberg all talked about on the same subject, only said the words different. When Mr. Clifford talked I paid just as close attention as when Mr. Baker talked. When Mr. Ruthenberg talked on the 20th, I walked around the Square. I know positively Clifford talked against conscription.

Q. Can you state positively whether Clifford talked about registration or do you consider those the same thing?

A. I take them the same.

Q. That is, you do not distinguish between registration and con-  
scription?

A. I know he talked against registration, and if you talk against registration you talk against conscription.

Q. And if you talk against conscription you thought that was a talk against registration, didn't you?

A. I know the word when he says "registration;" I know he is talking against it then.

Q. Did he use the word "conscription?"

A. Yes, sir.

Q. Did he use the word "conscription" or "registration" each time just as you have given it?

A. He used them both.

Q. You did not distinguish when he said "conscription" and when he said "registration," did you?

A. I surely ought to know the difference in the word.

111 Q. I do not mean the difference in the word, but did it convey any different meaning to your mind?

A. I just don't understand you on that part.

Q. That is, do you confuse registration with conscription, consider them practically the same terms?

A. No, I do not.

Q. Meaning the same thing?

A. No, I do not.

Q. Or do you have a difference in your mind?

A. I have a difference in my mind.

Q. What is the difference?

A. The difference in my mind is if you are registering you are only going down and writing your name, where conscription is just *liking* drafting; they can draft you.

Q. Now, how long have you kept that distinction in mind?

A. Since I have heard these socialist speeches.

Q. Did they distinguish between the two?

A. They have talked against—

Q. Did they point out the difference between registering and being conscripted?

A. Yes sir.

Q. They pointed out the difference?

A. Yes, sir. They said if you are registering you are running chances of being drafted. That means as much that you are running chances of being conscripted.

Q. That is, you say that drafting and conscripting are the same?

A. They seem the same to me.

112 Q. And registration did not seem to you very different, did it?

A. It is entirely different, yes.

I would say it was about the center and near the finish of Mr. Clifford's speech that he made the remark about conscription. Generally when he talked of registration, he talked of conscription, because the talk was not of conscription, the talk was against registering June 5th, and the results was pointed out, what it would be if you would register June 5th. He talked of registering and conscripting all at once. I do not know exactly in what part of Baker's speech he talked of conscription. I know it was in his speech though. He did not start right out about conscription, not the first word right out. I do not remember what he did say at the first. I cannot recall any statement that he made at the beginning. As to whether I remember how he closed his remarks, I know he says about him being arrested in Akron, or wherever it was, and there when it was questioned him what he would rather do—to be drafted and go to the trenches or be shot, then he said, "I would rather be shot here as a man than in the trenches as a dog." He said that he had said that at Akron. I don't know if he exactly closed his speech in that way. I can't recollect just how he did wind up his speech.

As to what he said about capitalism, he says capitalism is the cause of this war, because there are foreign markets, one trying to overdo the others, and then our being robbed out of this here money, and then it is up to them yet—they go to work and call us 113 to defend what they robbed us out of. They all talked about the same. I can say Baker said this. He said the whole socialist party is opposed to war. He explained how the socialists voted in St. Louis, and re-adopted this here principle of not registering, that all socialists would stand to this and would not register. Baker said something about the St. Louis meeting, but I cannot recall what he said as to what kind of a meeting it was. It was something about registering, that they had decided not to register. I do not know what kind of action had been taken there, but he said

something about St. Louis when he talked. I don't know whether that was at the beginning of his speech. About the center or the end of Baker's speech he remarked about conscription. I cannot give you the exact language that he used when he spoke about conscription. The substance of what he said, as I understood, was that he was of military age and would refuse to register and advised others not to register.

Q. Now, let me ask you, Mr. Schue, whether or not you are positive he said "register" or "conscript," or whether he used the word "conscription," that he was of military age and he would refuse to be conscripted?

A. I believe that he said that he would refuse to register.

Q. You believe it?

A. Yes, sir.

Q. But you have been giving us the substance and not the exact language?

A. I cannot recall the exact language because I have not 114 copied it in shorthand or typewriting.

Q. You simply got that inference from his speech in a general way, that he was saying that he would not register?

A. Yes, sir.

Q. He may have said, "I will refuse to be conscripted"? You would not positively deny that, would you?

A. He may have said it later on.

Q. Could not he have been saying that at that time?

A. If he says: "I will refuse to register" he would surely follow by saying: "I refuse to be conscripted."

Q. That is, it would be the same thing in your mind?

A. It would not be the same thing. I says he would follow with that.

When he said that this was the standpoint of the socialist party, that he would refuse to register and this was the standpoint of the socialists, I gathered from his remarks that all the socialists were going to refuse to register, and were going to defy the law requiring them to register. He talked against registration and he advised others not to. While he was talking of conscription, talking of the socialist standpoint, while advising all others, to cheer them along, I guess, he brought it in that he, too, would refuse to register. It was in that connection that he brought in about all the socialists refusing. He made the remark that he would rather be shot here as a man than be shot in the trenches of Europe as a dog. He said that he said that some place to a reporter, I guess, and he brought that remark up again. He was repeating something that he had

115 said to some man at some other time. He said somebody asked him what he would do, whether he would register or not, and he said that he told that man that he would rather be shot as a man here than out in the trenches be shot like a dog. I believe that Baker made these remarks after he said that this act was against the Constitution. First he talked about the constitution and then he talked about registration, and that he was willing to be shot like a man for not registering.

On May 27th Max Hayes was the first speaker. I do not know him personally. I know it was Max Hayes by his being introduced. I could point him out if he was here. I do not see him around here. When this man introduced Max Hayes, it was on the Public Square over at the other stone, right across them Marshall's Drug Store. Max Hayes talked the Sunday that Wagenknecht was arrested, the Sunday immediately following the speech of Baker. They were standing on a stone step. The street cars run along there and were running at the time. The speakers judged the crowd to be about two thousand, and mentioned it as about two thousand in their speeches. I cannot recall which speakers mentioned it.

In the second meeting, the first speaker, Max Hayes, talked on the conscription law and said it was the law and they should abide by the law. I should judge he talked about one hour and fifteen minutes. I heard him the whole time. I was standing about twelve feet away from the platform, right in the middle of the crowd. I should say there were about fifty policemen around. I did not see any stenographer or anybody taking it down in shorthand. The crowd was just packed in up against the platform. After

116 Max Hayes talked, Wagenknecht was next. All of this time

I was standing. Wagenknecht talked about fifteen minutes. During the time he was talking there was much interruptions from the crowd in the form of applauding, shoutings and hand-claps. I did not notice anything else by way of interruptions. These interruptions were frequent, and some of them were prolonged. At the start, he criticised the remarks of Mr. Hayes. He says that Hayes is not representing the socialists, that Max Hayes' remarks were not in line with the Socialist position. During the whole time that Max Hayes was talking I gave close attention. All that I remember about Max Hayes' talk was that he said that the conscript law is a law and we must abide by the law. He talked about capitalism, talked about the way the people have got in different countries, about how the people have got it in Australia by sticking together, and how the people are advancing and freeing themselves in Russia, and he talked on this Conscription Act. The main part of his remarks the way it seemed to me, was capitalism and conscription. He used the word "conscription" and he used "registration." I cannot recall whether he used the word "draft." While he was talking he was sometimes interrupted by applause. I applauded once in a while. When Wagenknecht talked, I also applauded. I know the person who acted as chairman introduced Max Hayes. It was not the same man who introduced the next speaker. A different man introduced Wagenknecht. While I was listening to Max Hayes, I did not meet any person in the crowd that I knew. I did

not see any faces around there that I recognized. After

117 Wagenknecht had talked about fifteen minutes I did not see anybody that I knew. I saw the arrest of Mr. Wagenknecht. I do not know who it was that arrested him. When he was arrested I did not go with the crowd. I guess the crowd went down to the court house, following the policeman who walked down with him. I listened to the other speech and then I went down.

The crowd was just a few minutes in departing, and then the other speaker started, Mr. Ruthenberg. I had never seen or met Mr. Wagenknecht before and did not know him by name before. I did not know Mr. Ruthenberg before. I had heard him.

Q. Had you ever had any communication at all with him?

A. No, sir.

Q. Or with the Socialists?

A. No, sir.

Q. Never had done anything at all to identify yourself with the Socialist party?

A. No, sir.

After Mr. Wagenknecht was taken away, Mr. Ruthenberg got up. He was introduced by a man whose name I do not know. He was here in the court room. I can't see him now. Mr. Ruthenberg must have talked about half an hour or forty minutes. I listened clear through. Mr. Wagenknecht was no more than taken off the stand than the man got up on the stand and introduced Mr. Ruthenberg. He said the people should stay there, should not follow the policeman, should listen to the next speaker. He talked about two minutes. The man who introduced Max Hayes talked about 118 a minute or so. The man who introduced Wagenknecht

talked a minute or two. After Wagenknecht had talked fifteen minutes, there was a little interval of confusion. I should say it took about three minutes until the crowd had quieted down and the next speaker could go on after Wagenknecht's arrest. On the assumption that Ruthenberg talked thirty minutes, I stood there two hours and some five minutes listening. Mr. Ruthenberg's remarks were made at the close of this meeting. I had been giving close attention through it all.

It was Wagenknecht that made the remark that the Socialist Party has taken a decided stand against conscription. His exact language, as I remember it, was, he said the Socialists have taken a very decided stand upon "This here act" or "Upon this here Conscription Act." I cannot give you the exact words. He says: "We will fight and fight till there is no more fight in us until this Conscription Act is erased off of the statute books." He said: "You have got two things in this here. In obeying and disobeying the law. You can either obey the law and go to work and eat sand and dust the rest of your life, or else disobey and stand up like a man and go to jail." He gave them the Socialist standpoint there, and the other speakers had said all those that would not register would have the full support of the Socialist Party. I cannot repeat what Mr. Wagenknecht said on that occasion immediately following Max Hayes, but anyhow he says Hayes is not talking or representing the Socialist Party and his idea is different from the socialists. I cannot recall that he went into any elaboration of what 119 the difference was. He then went on to talk about the standpoint of the Socialist Party with regard to conscription and that they should not obey conscription and that they should fight and fight and fight until they had this statute erased from the statute books, and he told them they could either

obey the law and take the chance of being drafted or they could disobey and go to jail. I do not remember what his concluding remarks were when the police came and arrested him, but I just know it was against conscription. Then the police jumped in and arrested him right in the midst of what he was saying.

After Mr. Ruthenberg had arisen, there was applause. I heard what Mr. Ruthenberg said at the beginning of his remarks. I think the substance of his opening remarks was: "An act has occurred here this afternoon just like has been occurring in Russia right along." I do not recall what followed that. The next thing he said that stuck in my mind is about capitalism. After he talked on capitalism, he talked about registration. He said he would rather have his body riddled with bullets than to submit to conscription. That is his language as close as I can recall it. I cannot recall anything further. The part which I have given you is what I do remember clearly. I cannot give you the wording of anything beyond that. I can recall it if I have got an impression of it. At the close of Mr. Ruthenberg's remarks, I walked down to the jail and walked around the jail.

(Thereupon the court cautioned the jury as to their conduct and adjourned until 1:30 p. m.)

120

(1:30 p. m., July 19, 1917.)

Mr. Kavanagh: Mr. Sharts, have you any objection to this answer being filed as of July 17, without a formal order?

(Handing paper to Mr. Sharts.)

Mr. Sharts: If your Honor please, I must interpose my objection. They at that time when I asked that they file an answer or a demur or so as to make an issue, or file exceptions, did not do it, and the Court ruled that they were not required to, and it seems to me, if they made a mistake, and the Court was wrong in his ruling, they ought not to be permitted to correct it at this time, after the challenge to the array has all been disposed of.

The Court: I remember that yesterday the request was made that they might do so.

Mr. Kavanagh: Before you disposed of it.

The Court: Before the jury was impanelled, and the defendant did not object and I said if there was no objection that might be done.

Mr. Sharts: That was in regard to the plea in abatement.

The Court: With regard to both.

Mr. Sharts: I certainly did not understand that they were asking at that day to file an answer to the challenge to the array. I thought it was simply in case your Honor permitted a plea in abatement to be filed.

The Court: I understood it the other way. I will take the paper and will have the stenographer look up what occurred and then decide what should be done.

(Thereupon the examination of the witness Alphons J. Schue was resumed as follows):

121 Cross-examination (Continued).

By Mr. Shrts:

At the time that Mr. Ruthenberg was speaking, there was another meeting being held on the Public Square by some religious order. I did not notice what order. They stood right across from Marshall's Drug Store, on the same stand as Mr. Ruthenberg. They gave way for the Socialist party because at that time they can only take the one stand, and they gave way for these to use the stand to speak. During the time that Mr. Ruthenberg was speaking, there was music at the Recruiting Station. I cannot just recall whether it was at that time. I know there was music there, of a fife and drum corps. I cannot say if they were speaking for recruiting or what for. I heard some noise there. This was while Mr. Ruthenberg was speaking. I do not know whether the music had been playing for some time, but I know it started while he was speaking, while I was there. I could not say for sure whether or not it was playing while Mr. Wagenknecht was speaking. I do not believe it was playing when Mr. Hayes was speaking. It might have been playing while Mr. Wagenknecht was talking and I am sure it was playing while Mr. Ruthenberg was speaking. I do not recall any other noise on the Square while this talking was going on. After Mr. Ruthenberg finished, I went down to the police station immediately, just to see where the crowd went to, and then went home. I did not meet any acquaintance there that I talked with and did not enter into conversation with any one that I can recall.

122 Redirect examination.

By Mr. Wertz:

Q. Were you on the 5th of June an enlisted man in the regular army, navy, marine corps, national guard or naval militia in the service of the United States, or an officer in the reserve corps or an enlisted man in the enlisted reserve corps in active service?

A. No, sir.

Mr. Sharts: I will ask the Court to strike out that answer for the reason that on redirect examination, if I am correctly informed, under the rules of evidence, they cannot introduce new matter.

The Court: I will permit the inquiry to be made, in my discretion.

(Exception by defendants.)

123 Mr. Wertz: I would like to offer now the record in this case, which shows that Alphons J. Schue plead to this indictment.

The Court: Produce the record, Mr. Clerk.

The Clerk: The record is in court, if your Honor please.

Mr. Wertz: I will call Mr. Denzler.

Thereupon, FRED J. DENZLER, was called as a witness in behalf of the Government and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

Q. I am asking you now, in connection with the case of the United States versus Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, No. 3873, pending in this court, when Alphons J. Schue was arraigned and plead to that indictment, what his plea was?

A. On July 5th, the defendant A. J. Schue was arraigned. He plead guilty in manner and form as he is by the indictment therein and thereby charged.

The Court: Any cross examination?

Mr. Sharts: No sir.

124 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, JAMES L. LIND, who, being first duly sworn, testified as follows:

Direct examination.

My Mr. Wertz:

My name is James L. Lind. I am Chief Assistant Police prosector of the city of Cleveland. I am acquainted with Mr. Wagenknecht, Mr. Ruthenberg and Mr. Baker. I was present on the Public Square on the 20th of May, 1917, on the occasion when Mr. Baker made a speech. On that occasion Mr. Baker started off with a talk with reference to the war in Europe and the cause of the war. He said that the foreign countries had been dragged into the war by reason of the system of over-production, as he termed it, and it was for the purpose of seeking the new markets for that over-production of the capitalist class. He talked at length on that and then he referred to the conscription law, saying that the national party in convention at St. Louis had passed a resolution in which they were opposed to the conscription proposition, and he said also that the socialists of the state had re-enacted that same resolution. Of course, his exact words I do not entirely remember all the way through for the reason that I heard several meetings and heard several speakers at each one. He said that by the conscription law, if a man failed to register, he could be sent to jail, and then said that there are two things you can do. You can either register and go to murder your fellow workmen or else you can go to jail, and then—I think in a joking way—he said something about "Then the capitalists will have to feed you," and then he closed up with—There was more said, of course, with reference to this conscription,

but that in substance is what I remember of the speech. I think he said the Socialist Party would defend those arrested for failing to register. He also said this, that the law was unconstitutional, and referred to the section of the constitution which provided that a man's right to his pursuit of happiness shall be inviolate. That is about all that I recall of his speech. I do not recall whether he read a resolution or not. The resolution of the National socialist party was referred to and he gave it in substance, but whether he read it or not I don't know. I do not recall whether Baker said he personally would or would not register. It was a speech that took all told, I think, over half an hour to deliver, and perhaps fifteen or twenty minutes of that was devoted more especially to the causes of the war and a discussion of the war situation, and then he said there was this other subject of conscription and registration, and I have given, I think, the main things that I remember that were said there by Baker. I do not recall anything else that he said on the question of registration other than what I have testified to.

I was present at the Police Station on the 27th of May when Wagenknecht was brought over there. On that occasion he told us his full name and address and that he was employed by the Socialist

Party as a state organizer, I think, and that he had been so 126 employed since December of 1916. He said that he had been interested in socialism practically all of his life and that at times he devoted all of his time to the party and that at other times when the party did not have enough funds he had other employment. He talked about his speech of the 27th just immediately previous to his coming to the station house. Parts of the speech were read to him. I think the parts that were read went something about as follows: something about, "we, the socialist party, will fight and fight and fight this conscription law to the end." He was asked if he had said that and replied, yes, he did. Of course, other parts of the speech were read and there was a whole lot more said. I asked the stenographer, Frank Farasey, to read from his stenographic notes.

I was in the crowd and heard Max Hayes make his speech on the 27th of May. He was the first speaker, if I am not mistaken. Max Hayes in his speech advised the socialists to band together to have the law repealed by means of political action and said further that he would not advise any one of age not to register, and so when Wagenknecht came over to the station, I said: "Well, Max Hayes kind of upset the dope today." I think I used that slang expression. "You did not expect him to talk in that tone, did you?" I think his answer was: "Not exactly," and then another answer to that question put at the same time was: "Well, Max Hayes has been away from the party somewhat of late." Whether that was to that first question or not—several times we referred to that matter of

127 Hayes' talk being along a different line than Wagenknecht's—and then there was some talk about Wagenknecht, as to his apparently fiery way of making his speech. I think I asked him if he was angry because Max Hayes had talked in the tone he did. Something along that line was said. In Wagenknecht's speech on the Square, he said that Max Hayes in his speech did not represent

the platform or program of the Socialists with reference to conscription, and that he reiterated again, I think, in the meeting at the police station. Max Hayes had said that he would not advise any one not to register, he would advise any one of age to register, but that he felt the law should be repealed in the legal way, that is, by banding together politically. I referred to Hayes' statement and attitude in talking with Mr. Wagenknecht after he was brought to the jail and I said: "Max Hayes kind of upset the dope today, didn't he," or something along that line, or to the effect that Max Hayes evidently did not go in line with the rest of the speakers. There was something said about free speech, if I am not mistaken, and I said that it was not our purpose to interfere in any way with free speech, but I did not feel that when a man was advising violation of the laws that that was in any way what was meant by free speech. It seems to me that Wagenknecht replied either to that or some similar question: "Well, maybe I did go too far." I made a comparison to Wagenknecht, comparing Hayes' attitude to his in regard to advocating the violation of the law, but do not exactly recall what he said in answer to that.

### 128 Cross-examination.

By Mr. Sharts:

I have not testified as to all of Mr. Wagenknecht's statement with regard to the affair of May 27th. I heard the speech of Mr. Wagenknecht on May 27th on the Square, I did not testify as to all I recalled of that speech. As to what else I recall, he got up, as I say, real excited and seemed to be in a hurry to say what he had to say. His face was flushed and his first statement was to the crowd that he did not—that Max Hays did not represent the socialist party in his speech just finished. Then later on he said that the socialist party was unalterably opposed to the conscription law and would fight and fight it to the end he said—and this was in a very excitable way that he said this—he said: "Now, you can either go to jail or go to murder your brothers. You have a choice of one of two things. You can either go to jail"—and he repeated that several times, and the crowd at that point yelled, "Jail, jail," a couple of times, the people in the audience back of me yelled, and then it was just shortly after that that he was taken from the platform and taken over to the station. He was interrupted in his speech. I heard him use the words distinctly, that they were going to fight and fight and fight against this conscription law. I think he might have said "until it will be erased from the statute books" at one point. I do not have a distinct recollection that it was said, of that part of it. I have of the use of the words "fight and fight and fight" the conscription. You see I heard meetings on the 6th and 20th

129 and 27th and then a few other Sundays following that and so I do not remember them as well probably as if I had only heard one. He pointed out the distinction between what Max Hayes said and the position of the socialist party. That distinction, as I got it, was that Max Hayes would advocate a repeal of the law by

means of numbers in a vote of some sort and through Congress, but that the socialist party were advising young men not to register. He did not use those words, but he referred to the national platform. He said that the party stood by that national platform in St. Louis, if I am not mistaken. I do not recall anything in his speech that indicated that they would not stand by the entire national platform. I remained there after Wagenknecht was arrested on the 27th. Mr. Ruthenberg talked.

Redirect examination.

By Mr. Wertz:

I recall asking the question: "Hayes evidently does not believe in advocating the violation of law and that is where he differs from you?" I do not recall what Mr. Wagenknecht answered in reply to that question. I do know, in answer to that, he said this, that the socialist party were opposed to the registration-conscription law and were advising refusal to register and that Hayes had simply advised that they work together to get the law from the statute books.

130 Recross-examination.

By Mr. Sharts:

Q. This statement that you refer to, was it at the police station?  
A. Yes, in the police inspector's office.  
Q. Was Mr. Schue present?  
A. I don't think so. I don't know Mr. Schue.

Mr. Sharts: If your Honor please, I am going to ask to have the testimony of this witness with regard to any admissions made by Mr. Wagenknecht at the police station stricken out as not having been made in the presence of Mr. Schue.

The Court: I will overrule your request and you may have your exception, but I will make this statement in addition to that—

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony given by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

Mr. Wertz: I ask the court to add only as it applies to Mr. Wagenknecht.

The Court: Yes; that which transpired down there can only be regarded by the jury as it applies to Mr. Wagenknecht.

When I questioned Mr. Wagenknecht at the police station 131 asking him about the position that the socialist party took, I was clear in my own mind as to the position of the socialist party. I thought I knew what their position was because I had heard six or seven speakers. I had heard Wagenknecht and Ruthenberg and Tom Clifford and some man whose name I do not recall now—I think he was representing the socialist labor party—and there

was one other speaker whose name I do not recall, on the different Sundays. I heard some of these talks on May 6th, 20th and 27th. I do not necessarily consider the statement of the socialist labor party speakers as showing the position of the socialist party, only as they were reiterated by the socialists when they talked. It was a joint meeting. It was announced as a joint meeting of the two organizations. I am not positive whether that was the meeting of May 6th, or the one of May 20th. My best recollection is that it was the one of May 6th. I understand that was before the law was passed. The statements that they made at that time were with reference to a law that they saw impending possibly, but not yet enacted, I guess. I heard everything that Ruthenberg and Wagenknecht said on the 20th and on the 27th, and it was from that that I got my impressions as to the position of the party. After listening to the speeches of May 6th, I did not cause the arrest of any of the socialist speakers, nor on May 20th. I heard the speech of Mr. Ruthenberg following Mr. Wagenknecht on May 27th. I did not cause the arrest of Mr. Ruthenberg.

132 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, S. J. STUCKY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Breitenstein:

My name is S. J. Stucky. I reside at 7811 Platten Avenue. My occupation is that of Patrolman on the police force of the city of Cleveland. I have been a patrolman in the police force of the City of Cleveland for six years. I was such officer on the 20th day of May of this year, and on the afternoon of Sunday, May 20th, of this year, I was assigned to the northwest corner of the Square in the city of Cleveland. I heard several speakers on the Public Square on the Sunday afternoon, May 20th of this year. One was Baker, the gentleman there. (Indicating defendant Baker.) Ruthenberg is another one. What I heard Baker say in that public address on the 20th of May, in substance, was: He spoke more on the foreign affairs and the market, as to how the war was brought about, the condition of the capitalists and the affairs of Europe, and as a socialist speaker he spoke on conscription, which he said was unconstitutional, and if he was in the age limit, which he is required to register on the 5th day of June, he would rather go to jail than go over and shoot down his brother men, and if there was any young man in the audience between that age, they can have the same privilege of going to jail or registering, which the capitalists would feed them while they were there. That during a national convention

133 at St. Louis the socialists as a body opposed the war and as a body they would try to repeal the law, and he then spoke on different capitalists and the market, and the market was open and when the capitalists wanted to find a new market, in order to declare the war, it was brought about, they had to find a way and a

means to ship their produce to a foreign market. He said that the conscription law was unconstitutional and if he was of the age of conscription when he was called on the 5th day of June to register, he would rather go to jail than to shoot down his brother men. He said he was within the age limit, and would be called upon to register the same as the rest of the young men within this ordinance, and when he would be called upon to register he would rather go to jail than shoot down his brother men. With reference to the socialist party aiding any of those who refused to register in accordance with the provisions of the selective conscription act, he said that if any of them were arrested they would see that they were taken care of to their best ability as they could. That is all that I can recall in reference to the registration and the conscription law.

I came to the Public Square on Sunday afternoon of the 20th of May of this year at 1:15 with a squad, and remained there until about 5:45. I was there all the time between 1:15 and 5:45. With reference to the place where the speaker was standing on that 134 afternoon, I was about eight to ten feet from the rostrum, that is, the speaker's stand, more in the southwest corner of the speaker's stand, within eight or ten feet of it. I heard practically all that the speaker said. I was there during the entire speech of Mr. Baker. I heard Mr. Ruthenberg speak on that afternoon. I could not say whether he was there during the time Mr. Baker was speaking. There was quite a crowd there. He was there a part of the time. I could not say whether he was there all of the time or not.

#### Cross-examination.

By Mr. Sharts:

The speech of Mr. Baker that I listened to was on the 20th. I did not say there was a socialist labor speaker there. Mr. Baker began, I should judge, about two or two fifteen, somewhere near that time. There was another party speaking before him, but I do not know his name.

I have never seen this young man Schue before that I know of. I do not know him. (Mr. Schue stands up.) I never saw that man to my knowledge. I did not see him there on May 20th that I know of.

Mr. Baker spoke about 25 minutes, I should judge. During that time there must have been a crowd of about 1500 people, I should judge. They applauded once or twice while Mr. Baker was speaking. When Mr. Baker was speaking he would turn. He would talk at one time in one direction and at another time in another. He never turned his back in my direction. When he would turn from 135 side to side, naturally his voice being throwed on a side as he kind of turned, it would become more or less distinct. He did not turn all the way around; more of a quarter of a turn of a circle. When he turned away I could hear every word. During the time he was speaking you can hear the noise of the street cars passing, and people passing there at all hours. That afternoon there was another meeting a little further over, some religious meeting.

That was on May 20th. There was no recruiting going on at that time that I know of.

I was present on May 27th. While Mr. Baker was speaking, I saw Mr. Lind, the police prosecutor, there. There was no interruption of Mr. Baker by the prosecutor that I saw. He was not placed under arrest on the 20th. Mr. Baker was not prevented from making any statements. When he finished, he left the audience, as far as I could see of him. The meeting closed, I should judge about 4:45 or 5:00 o'clock.

When Mr. Ruthenberg was speaking, the police prosecutor was there part of the time. After Mr. Ruthenberg finished speaking on the 20th, there was no arrest made of either Mr. Baker or Mr. Ruthenberg. When Mr. Baker was speaking, there were, I should judge, about 20 police throughout the Square, and about the same number when Mr. Ruthenberg was speaking. I was present when Mr. Wagenknecht was speaking on May 27th, but I was not the arresting officer. Mr. Baker in his talk said that conscription was unconstitutional. He said he was within the age limit, the same as

136 a good number more of the young men within the hearing of his voice, and if he was called upon to register on the 5th of June he would rather go to jail than go over and shoot down his brother men. I do not remember that he said he would not register. I did not hear him tell any man "You must not register" or "should not register." He said he would rather go to jail than shoot down his fellow men, his brother men. The only thing he spoke of on the socialists was on the convention at St. Louis. He did not speak on resolutions that were adopted at that convention or tell any of it. He did not produce anything that he read from that I saw.

137 Thereupon the Government, further to maintain the issues upon its part, called as a witness on its behalf, WILBUR D. BACON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Wilbur D. Bacon. I live at 1579 Rosewood Avenue, Lakewood. I am in the service of the United States. In the month of May, 1917, I was in the newspaper business, employed on the Cleveland Leader. Since then I have enlisted.

Q. Were you present at a meeting some time in May at which Ruthenberg and Wagenknecht were present?

A. Yes sir.

Q. Do you recall the time of that meeting, the date?

A. It was on or about the 13th day of May.

Mr. Sharts: I object to any further examination on that line.

The Court: What have you to say?

Mr. Wertz: I want to inquire about this resolution.

(Referring to Government's Ex. No. 1.)

Mr. Sharts: I will interpose my objection to the introduction of any such leaflet unless it be first established that it was used after the enactment of the law.

The Court: I will say to the jury, and I will say to them now, that no conviction of these defendants or either one of them can be predicated upon any act which was done and performed 138 by the defendants prior to the 18th of May, 1917, but it is in evidence here from one of the witnesses who has testified that after the 18th day of May 1917 some one or the other of these speakers referred to the action taken by the local organization of the party that they were undertaking to represent and proclaimed in a way what that action had been, and you will recall the other testimony, which seems to me makes this evidence competent, if for no other reason than as bearing upon the motive and intent and as characterizing the conduct and attitude of these three defendants on the 20th and 27th of May. I am not undertaking to say what its weight would be. The competency of this witness to testify with respect to any resolution or any action taken or that would bind either of these defendants as participants in the adoption of it or assent thereto has not been disclosed, but this statement will indicate in a general way what my ruling will be as questions arise, so that you may take your exceptions now or interpose them from time to time.

Mr. Sharts: I will take our exception now to the ruling of the court, and, if your Honor please, I would like to call your attention further, for the protection of the defendants in this matter, to the fact that we are, I believe, limited strictly to what was brought to the attention of Mr. Schue. Any activities by the association, either before or after May 18th, if those activities were not brought to the attention of Mr. Schue, cannot be introduced in this case.

139 The Court: I concur entirely in that position. I shall rule and charge in accordance with it, but the testimony here as to what was said and done by these defendants on the 20th and 27th of May in the presence of Mr. Schue makes competent, if it should appear that these defendants were participants in the adoption of any resolution of this character, the evidence of the fact as characterizing their motive and intent and as bearing upon the primary charge here as to whether they aided and counselled Schue wilfully and as to the intent with which their acts were done and performed which have been testified to. That will be the line of ruling. You may have your exception.

Mr. Sharts: I will take my exception to that and ask Your Honor whether it is necessary to raise the question now as to the form of this resolution in the leaflet as it is offered here?

The Court: We will see about that when we get to it. He has not proved any resolution was adopted and he has not proved the contents of it nor that these defendants were involved in it. I will rule on your objections as we progress.

Q. Do you recall who presided over the meeting?

A. Mr. C. E. Ruthenberg presided.

Q. Is that the gentleman sitting at the table here?

(Indicating defendant Ruthenberg.)

A. It is.

Mr. Sharts: Enter an exception.

The Court: The objection will be overruled.

Q. Did you see Mr. Wagenknecht at that meeting?  
140 A. Yes, sir.

Mr. Sharts: Enter our objection, and I will ask the witness to wait always until I enter the exception.

The Court: Mr. Stenographer, you will note an objection and exception to each one of these questions and answers, even though Mr. Sharts does not specially mention it, and I do not specially rule.

Q. Do you recall whether or not Mr. Baker was present?

(Objection by defendants; overruled; exception.)

A. I do not recall if he was present or not. I did not see him.

Q. Do you recall the presentation at that meeting of a resolution in regard to the registration under the Conscription Act?

(Objection by defendants; overruled; exception.)

Q. I hand you a paper marked "Government's Exhibit No. 1" and ask you to examine it and see if you recognize what that is?

(Objection by defendants; overruled; exception.)

A. That is the resolution passed at the meeting at the Socialist Hall.

Mr. Wertz: I do not know whether the Court and jury heard the answer or not.

Mr. Sharts: I object to the presenting of that clipping. There has been no connection shown between Mr. Schue and any meeting at that time, of the reading of that resolution to Mr. Schue or any definite explanation of that resolution to Mr. Schue.

The Court: I think it would perhaps be prejudicial to 141 your clients if I were to summarize the testimony, as I recall it, of Mr. Schue as to what was said by these defendants in the meetings on the 20th and 27th of May. For the purpose of bearing upon the intent with which the acts were said and done which have been testified to by Mr. Schue as having taken place in his presence and in his hearing, I will admit the copy of the resolution referred to. I will say this much, that Mr. Schue indistinctly testified that it was stated by these speakers as to what had been the attitude of the National Socialist Party in their convention at St. Louis. It was further testified by Mr. Schue that it was stated by these speakers that the local organization of the Socialist Party of which they claimed to be representatives had taken some action, but without going further you will remember the rest of the testimony bearing upon that subject. Under the circumstances, as characteriz-

ing and bearing upon the intent which it is necessary here for the government to prove, I regard the resolution as competent evidence.

Mr. Sharts: Before he introduces it I want to call Your Honor's attention further to an omission. How has he identified the resolution referred to in any particular speech that Mr. Schue heard with this particular resolution? If Your Honor please, I ask that they introduce first the resolution of the National Socialist Party that they say the speakers on May 20th in the hearing of Mr. Schue referred to and said that the Socialist Party of Cleveland had taken similar action with regard thereto. There is no evidence before the Court at present that this is the resolution in accordance with the resolution of the National Convention of the Socialist Party.

142 The Court: I will overrule your objection.

Mr. Sharts: Enter our exceptions.

The Court: I did not understand you to say where the meeting was held where this was adopted.

The Witness: The meeting was held at the Socialist headquarters, 773 Prospect Avenue, Cleveland, Ohio.

Q. In Cleveland, Ohio?

A. Yes, sir.

Q. On the 13th day of May?

A. On the 13th day of May.

The Court: The resolution which has been identified by the witness as having been passed at that time at a meeting presided over by one of the defendants and attended by another one of the defendants may be read in evidence, but this will not be regarded as evidence against Mr. Baker, whom the testimony does not yet show was then present or a party to it.

Mr. Sharts: Will the Court permit me to question the witness on a few points?

The Court: That you think goes to the competency of the testimony now offered?

Mr. Sharts: Simply as to his knowledge of how many resolutions were passed and with reference to what.

143 The Court: That does not go to the competency of the testimony now offered. It might go to his credibility or to his memory or to other matters which are collateral but not to the competency of what is being offered. No, not for that purpose.

Mr. Sharts: Enter our exceptions.

The Court: He is the Government's witness for the present.

Q. Do you recall whether there was a platform in this hall?

(Same objection by defendants; overruled; exception.)

A. There was a platform in the hall.

Q. Where was Wagenknecht with reference to that platform?

(Same objection by defendants; overruled; exception.)

A. According to the viewpoint of the audience, he was on the right of the right of the platform sitting in a chair near the table.

Q. How close to the front of the platform?

(Same objection by defendants; overruled; exception.)

A. Judging off hand, I would say four feet.

Q. Was he on the platform?

(Same objection by defendants; overruled; exception.)

A. He was on the platform, as I remember it now.

Q. Ruthenberg—where was he on the platform?

(Same objection by defendants; overruled; exception.)

A. He was standing and sitting alternately in the center of the platform.

Q. Did he have the gavel?

(Same objection by defendants; overruled; exception.)

A. He had the gavel.

144 Q. Do you remember if either Wagenknecht or Ruthenberg spoke in regard to this resolution?

(Same objection by defendants; overruled; exception.)

A. They both spoke in regard to the resolution at various times.

Q. Was this the resolution that was adopted at this meeting?

(Same objection by defendants; overruled; exception.)

A. Yes, sir.

Mr. Wertz: I now offer in evidence the resolution as Government's Exhibit 1.

The Court: Read it. The defendant- may have an exception.

Mr. Sharts: I will ask, if Your Honor please, that the entire handbill that he has clipped from be offered at the same time.

The Court: The Government will please comply with the request, and put the whoie handbill in.

Mr. Wertz: At the request of the defendant-.

The Court: The rest of the handbill goes in at the request of the defendant-.

(Thereupon the handbill was read to the jury by Mr. Wertz, the part containing the resolution being marked "Government's Exhibit No 1," and a complete copy of the handbill being marked "Government's Exhibit No. 2.")

Mr. Wagenknecht resides at 1291 Cook Avenue, Lakewood, Ohio. He is the gentleman at the end of the table, there.

## 145 Cross-examination.

By Mr. Sharts:

I attended a meeting on May 13th or thereabouts. It was either the 13th or the 14th. If the 13th was on a Sunday, the date is May 13th. At that time there had not been any enactment or passing of any conscription act in Washington that I know of. The act was passed by Congress May 18th, some five days after this. At the time this resolution was adopted, I believe it was understood that the registration should be enforced by the laws of the United States. It was understood by the President's message to Congress. That is my opinion of it at this time. I am not able to give any legal answer on that, because I do not know. I do not know whether at that time it had been finally determined that there was to be a penalty attached for refusing to register. At that time I do not believe it could have been possible for a man to have inferred that there was to be a voluntary registration, as at election time. It was generally understood that conscription is what it means, that it is not voluntary. On May 13th I had read the acts which were being argued in Congress. As far as I know, I do not believe there were men advocating both the voluntary method and the involuntary method. The distinct feature of the conscription act which was being fought out in Congress was involuntary conscription, and it was that involuntary act that the socialists gathered in that hall were fighting against and passed this resolution

to offset. At the time when this resolution was passed, the 146 form in which registering was to be done had not been decided finally. That had not been decided until May 18th. At this meeting of May 13th, I did not receive that leaflet (referring to Government's Exhibit No. 2). I received a copy of the resolution from Mr. Ruthenberg. Mr. Ruthenberg presided at that meeting of May 13th. It was on a Sunday afternoon, if Sunday was May 13th. Mr. Wegenknecht was present. I do not remember of seeing Mr. Baker at that time.

Mr. Kavanagh: At this time we desire to offer in evidence Government's Exhibit 1, the resolution submitted, and Government's Exhibit 2, which is the complete leaflet.

The Court: Under the circumstances, for the purpose of not encumbering the record, may not a circular be substituted and the entire document marked Exhibit 2, but the record will show that all except the resolution was put in by request of the defendants after the court had ruled and they had made their exceptions to my ruling that the resolution itself was admissible in evidence.

(Recess.)

147 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, FRANKLIN H. FARASEY, who, being first duly sworn, testified as follows:

## Direct examination.

By Mr. Wertz:

My name is Franklin H. Farasey. My business is court stenographer, shorthand reporter. I was employed by Mr. De Woody, of the Department of Justice, to take in shorthand the speeches made in the Public Square in Cleveland on May 27, 1917. I have in my possession the original notes of the speeches which I took on that occasion. I produce those notes and turn to the speech made by Alfred Wageknecht. My notes of his speech read as follows: "We have a friend of ours here to my right, who is taking shorthand notes, evidently for the federal authorities. I hope that he will do me the great favor of underlining what I am about to say, because I want that to appear in capital type when he writes down the notes on his typewriter—not only in capital type, but in quotes and with exclamation points by the dozen after each sentence.

Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the socialist party of the United States, and, not agreeing with the official action of the socialist party of the United States, we must say that this afternoon Max Hayes does not speak for the socialist party. The socialist party

has taken a very definite and decided stand upon this matter  
148 of registration for conscription. The national convention of the socialist party went on record and declared that it shall be the duty of every dues-paying member of the socialist party to fight and fight and fight until there is no more left in them against conscription whenever and wherever he can. And we are going to fight. We don't intend laying down on the job at this time, just because our capitalistic government, controlled by the Rockefellers and the Morgans, say to us, "You shall do so and so." The capitalistic government has said to labor unions: "You shall do so and so" and time and again the labor unions have said, "We refuse to do so and so because it interferes with our liberties." And we say now, "We shall refuse to do that which interferes with the liberties and democratic rights of the working class." We socialists shall fight and fight until the conscription law is removed. What do you suppose we are standing on this block for every Sunday bellowing our lungs out? Do you suppose we are here just for fun or just to hear ourselves talk? We have got something to say. The socialists of this country and of this state, and of Cleveland, have laid specific plans which they intend to follow and which they are going to follow. It may be—it may be that the socialist party may seem—I say, may seem, insignificant, and an organization which to you may not seem to wield much power, but let me tell you this, friends—let me tell you this: The actions of the socialists of the world within the last several months have done more—and the publicity given to these actions by the capitalistic papers has done more—to  
149 eliminate prejudice against the socialists, and to bring about peace than anything else that could happen, no matter what you thought of it—and that is true.

Why is our Government afraid of the Stockholm peace conference? Tell me. Why is it afraid of the Stockholm Socialist International Conference? We know why they have been. We claim that peace shall be brought and that the war shall end with no country the victor. That is our claim. That is, I think, where eventually the socialist party, every local, every county and every state and national organization will stand. However, that is not the position of the American capitalistic class; that is not the position of the French capitalistic class; although it is the position of the Russian working men. And why is it not the position of the American and the English and the French capitalistic class? Because they have made up their minds that German capitalism shall be—shall disappear from the earth as opposed against French, British and United States capitalism. That's the reason why.

Now, the socialists don't care a whoop in hell which capitalistic class is the most powerful in this world. All we care about is that we shall make the working class of every country the most powerful in that country. And so we lay down this principle, that no matter what you may think about us socialists, no matter what you may think about us as an insignificant political party, we at least—under-

150 stand—we are at least the only party with backbone and power and nerve and the belief in justice and democracy suf-

ficient to come out before you and proclaim our principles irrespective of this man here who is writing the shorthand notes, irrespective of the recruiting station, irrespective of the policemen who are in the audience.

Now, there are two things you can do, friends. There are really two things you can do. There are always two alternatives for every man who lives in any democracy or under any republican form of government like this one. There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: you can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, "The time has come when we, through organized power and strength, must say to capitalists that they cannot any more curtail our rights and our freedom and our liberty."

Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, understand, in this movement for working class liberty, but then somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand. And so we are willing to-day to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription.

151 You can either register and run a chance of being drafted, or you can refuse to register and go to jail. Now, you have the right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and

go to jail as the Government has the right to say that you shall register and go to murder.

Well, the question is, of course,—you may applaud here this afternoon—but after a bit the question will be this: how many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? A man within the age limits—any man—any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest. There are subsequent ways to protest, but this is the first place to protest.

Now, then, we are here this afternoon to explain the situation to you. What we say this afternoon is this: that every man has the right to do one of two things, and I want to repeat that. He has the right to do one of two things. He can either refuse to register 152 and run a chance of going to jail'—That is all.

Q. What happened at that point?

A. The speaker was arrested, I think.

Q. What is that?

A. The speaker was arrested. At any rate, he stopped talking.

Q. Did you go with him or with Mr. De Woody to the county jail?

A. Yes, but I haven't those notes.

Q. I will hand you a transcript here and ask you whether you made that transcript from the original notes and whether or not it is a correct transcript?

A. Yes, all of that, and I read that over.

A. I will ask you to read the conversation that took place between Mr. Wagenknecht, Mr. De Woody and yourself and Mr. Lind at the police station, following his arrest?

Mr. Sharts: If your Honor please, I want to enter my objection at this time. Mr. Schue is charged as the principal who refused to register, and the statements that have been made here by the reading of those notes are the only statements that were made or that could possibly have been made in the hearing of Mr. Schue. Any further statements cannot be added on top of and in addition to what has been presented as a complete record of the statements made by Mr. Wagenknecht.

The Court: You do not object to the use of the transcript because he has not produced the notes here from which he says he has transcribed it?

Mr. Sharts: I understood he was reading from his original 153 notes on the first.

The Court: He did on the first. Now, on the conversation at the jail, he says that he does not have his original notes here but

he has the transcript of them which he himself made and says it is a correct transcript. If you insist that he shall send for his original notes and have them here for your examination, if you wish to examine them before he reads the transcript or reads from it, I would rule you are entitled to that.

Mr. Sharts: I ask that privilege, because I have some knowledge of shorthand myself.

The Court: Do you know where your notes are?

The Witness: This was taken at the police station on the back of other sheets. I think I can gather them all together. I am not dead certain that I can, but I believe that I can.

The Court: Where is your office?

The Witness: In the Engineers Building.

Mr. Wertz: We will pass that until we can get those notes.

Q. Following the arrest of Wagenknecht, I will ask you if you took down the speech of C. E. Ruthenberg?

A. Yes, sir.

Q. Will you turn to your notes and read that speech?

Mr. Sharts: Are these the original notes?

The Witness: Yes, sir, and the first speech also.

(Witness reads from notes:)

154 Comrades and friends: it is our purpose and our duty to remain here at this meeting and continue our protest against a violation of the democracy which the government of this country says it is fighting for. What has happened here this afternoon is the thing that has happened so often in Russia until the Russian working class took—I could not get the exact couple of words. There was too much applause.

The Court: There was applause at that point, then?

The Witness: Yes, sir.

The Court: Proceed.

A. (Continuing.) The socialist party in the United States and in the city of Cleveland is ready to uphold democracy at the expense of sending every one of its members to jail. Now, I am going to present to you, just as I intended to present to you before this interruption took place, our ideas and position in regard to the war and in regard to conscription.

The President of the United States, in January of this year, appeared before the Congress of the United States and delivered a speech in reference to bringing about peace. In that speech before the Senate of the United States he advocated bringing about the end of the war without victory for any nation. Immediately the news spread across the Atlantic to the nations of Europe that the President of the United States had demanded peace without victory for any nation, and the forces of democracy in Europe began to endorse the position taken in that speech. The socialists of

155 France went on record as favoring that position. The socialists of Great Britain, the minority party in Germany, the socialists of Austria and the socialists of Italy, and finally came the Russian

revolution, and the entire Russian people, through their committee went on record in favor of that program.

And then these working class organizations began to agitate, began to work for a peace movement to realize these terms of peace. The socialists International called a conference at Stockholm. It was initiated not as the lying, prostituted newspapers of Cleveland have said—it was initiated not by German influences, but by the Russian, the Swedish, and the Belgian socialists, Belgium, that Vanderbilt represents as Minister of Munitions, endorsed this position, as have the socialists in most of the countries represented by the allies in this war. And mark this. This is my point. This is the answer to that appeal which is being made to the young men of this nation to go out and fight for democracy. When the socialists of the United States asked for passports for its representatives to attend the conference, endeavoring to bring about peace on the terms annunciated by the President of the United States before this country declared war, this democratic country, so-called, refused to permit the representatives of the American socialists to attend that conference. If that is democracy, then Russia before the revolution was a democracy.

156 To-day the President of the United States stands in the position of having offered terms of peace, having offered terms on which to bring about the end of the horror, the bloodshed, the suffering, the misery, of Europe, the horror, the suffering, the misery into — the men of this nation are about to be plunged—having offered terms on which to bring about the end of this condition, and then refusing to permit—for the President is responsible for the action of the State Department—and then refusing to permit free men to leave this country to work for those terms—to work for peace.

Now, my friends and comrades, what is the reason the Government of this country does not desire the peace conference at Stockholm to be successful? Why doesn't he wish the working class, the working class representatives from every nation in Europe, to gather together to bring about mutual terms of peace through which they can save the working class from more misery, more suffering, more bloodshed, more killing and members of the working class?

The answer is that terms—peace brought about on those terms at the present time would not serve the interests of the capitalistic class of this country, in whose interest the war was declared and is to be fought. It is for that reason alone that the government of this nation does not want these socialists to be represented in the Stockholm conference or peace broughtt about through the efforts of the 157 working class. The capitalists class is not fighting a war for democracy. The United States is not fighting a war for democracy. It is fighting a war for commercial imperialism and the profits of the capitalist class of this country.

Now, then, if this be true, if the appeal for democracy be one of those lying statements which are always put out by the ruling class in every nation in order to trick the workers into serving their interests and offering their lives in their interests, what shall be the position of the working class of this country in regard to this war?

We have been told this afternoon that we are an insignificant minority. It may be true that the socialists' political organization in this country is still a minority, but in this matter it represents the wishes and will of the majority of the people of this country.

If there need be—if there need be any proof of that position, we need only to look at the audience which is assembled here and which has stood here in this spot Sunday after Sunday to hear the socialists denounce the government and its action in this war. We need only to look at it to secure the opinion of the workers of this city generally. We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the 158 Billy Sunday form of revivalism to induce you to register for conscription. They are afraid. They are afraid that the working class of this community may on registration day enact their own referendum in regard to this law by refusing to register. (Loud applause.) What is our action to be?

My voice is strong enough, I think, comrades and friends—my voice is strong to spread over this audience, I believe, in spite of the fact that we are to be assisted in gathering a bigger audience.

There was a fife and drum corps playing there.

Q. Does it show what the fife and drum corps was doing?

The Court: Your notes do not show anything on that subject, do they?

The Witness: Yes, I have here—

The Court: What do your notes show?

The Witness: Fife and drum corps.

The Court: Proceed.

A. (Continuing:) What is to be the position of the working class of this nation in regard to war and registration for conscription? Are we in this country, having been bludgeoned—no other word described it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the President and Congress was elected—are we to meekly submit and lie down and permit the ruling class to do evil, base, dirty work?

Have ever in the history of the world—have ever the rights, the liberty, and the freedom of a people been preserved by cowards who refuse to carry on the struggle in the face of danger? And we of the socialist party say to you that never in the history of the world have a people maintained its liberties, maintained its freedom, in the face of aggression, in the face of attempts to place democracy in the saddle by accepting the will of the ruling class.

It was difficult to take it because we were in the crowd and often times I would be elbowed accidentally and sometimes I would have the book up or down. That is why I have not got the word there (indicating to Mr. Sharts).

Friends, the only way we can maintain our freedom—the only way we can maintain our liberties in this country, is by continually agitating and working, rousing up the people to a sense of what is being done by their government; and, when the time comes, sweep

that government out of power and to elect the representatives of the working class to office to undo the evil work that has been done by those who are in power.

Now, my friends, for the benefit of the authorities in this 160 audience, and for the benefit of those who may be ignorant of the fact, I want to say that the first amendment to the Constitution of the United States, which is being rode over rough shod to-day here in this audience by the police authorities and the men whom they represent—the first amendment says that the right of the people to free assemblage—

Mr. Sharts: Let me ask, whenever you have in your notes the word "applause", would you please announce that? Read your notes as you have them there, not picking out just the speech?

The Court: Of course, the applause is not a part of Mr. Ruthenberg's speech, but if you request that he read it, he may do so.

Mr. Sharts: I want his complete notation read in.

The Court: All right.

A. (Continuing:) My friends, the only way we can maintain our freedom—the only way we can maintain our liberties in this country, is by continually agitating and working, arousing up the people to a sense of what is being done by their government: and, when the time comes, sweep that government out of power. (Applause.) And to elect the representatives of the working class to office to undo the evil work which has been done by those who are in power. (Applause.)

Now, my friends, for the benefit of the authorities in this audience, and for the benefit of those who may be ignorant of the fact, 161 I want to say that the first amendment to the Constitution of the United States, which is being rode over rough-shod to-day here in this audience by the police authorities and the men whom they represent—the first amendment says that the right of the people to free assemblage and to petition Congress through meetings of this kind shall never be abridged. That's what the document which underlies the institutions of this country says in regard to this matter, and we intend to avail ourselves, in the face of any power that may be brought against us, of this right to uphold freedom, to fight for freedom, through arousing the people of this nation to a realization of the things that they are facing.

And, further, we of the socialist party have taken a certain definite position in regard to conscription. We have taken this position, that the thirteenth amendment to the Constitution of the United States forbids involuntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that we people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law. (Applause.) And

so the socialist party of the city of Cleveland by resolution has 162 gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an

individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow human beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the socialist party that we urge and recommend that they refuse to be registered for conscription.

I say to you here this afternoon, as I said at the first meeting which I addressed on the Public Square after war was declared—at the first meeting, at a meeting, at a time when the ages in the conscription law had not been fixed, I said to you then, when I personally was in danger of conscription, that if I came between the ages provided for in that law, that I would refuse to register for conscription. (Applause.)

My friends, I am ready to say more: that if this law is amended, that if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the millions against the socialists on the battlefields of Europe, if, after a first million or two of the flower of the humanity of this country

has become the victims of the ruling class in their insensate greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends its law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted. Further, that if the time comes that I am asked to go into the army, if my name were registered by force and the government drafted me, believing, as I do, in humanity and being opposed to killing my fellow human beings—opposed to the wholesale murder which is going on in Europe—then I say that the ruling class and government of this nation will find that they will have to stand me against a stone wall before they can bring me into the army to fight their battles.

I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made. I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder. I would be saying little to you if I left you only this message. If I only told you that we socialists do not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete. What are we to do? What are we to do? What have we the power to do? My friends, let me say first and foremost that the one thing

that we must not do in this crisis—we of the working class 164 must not resort to any kind of force. We of the working class must not resort to any kind of violence. For us that would be suicide. Let us stand for the principles which we favor. Let us go from rostrum to rostrum, from meeting to meeting, to spread broadcast this message which we have been spreading here this afternoon. Let us preach this doctrine to all of the workers of this city. Let us insist upon our rights of free speech to the extent of our going to jail. Let us willingly and gladly go to jail rather than to the trenches, but let us never resist by force.

State what you have to say, and let the ruling class do its worst, for, remember, you have the power in this nation, you have the strength in this nation. When the time comes to do so, thrust those who are trying to enslave you out of office and yourself take control of the powers of government. Let us until that time abide peacefully, keeping on our agitation, never fearing the result of speaking the truth, for we have the right to speak the truth, but no violence and no force.

Remember, my friends, I tell you here so that you may spread the news around. Your first opportunity will come in the city of Cleveland on November 6th when you go to the ballot box. You have the power there to elect socialist candidates and make this a free city for the working class.

165 I assure you that the socialist party will continue these meetings as long as there are men who are able to talk. Next Sunday afternoon at 2:30 we invite you to bring an audience three times as large as this. That's all the place will hold. Come over to Market Square at Lorain and 25th and we will again present to you the facts of the betrayal of the people of this country by its servants in declaring war and placing a conscription law on the statute books.

My friends, if the Wilson administration had, before the November election of last year, said to the people of this country that "Next May we will enact a law by which we will be able to take the young men of this country out of their homes, by which we will be able to take those who are to be the stamina, the backbone, of our civilization in a few years and send them out to fight for the billion dollars which Mr. Morgan and his fellow capitalists have foolishly invested in the European war, by taking a gambler's chance and backing the allies to win—" if President Wilson and his supporters had said that before the November election, the President and the Congress that favored such a measure would have been buried under such an avalanche of votes that he would have been the worst beaten president in the history of this nation. (Applause.)

If the President and Congress, having enacted a law which even 166 all the appeals, all the urging, all the calls to duty, all the appeals in favor of a sham national patriotism which the newspapers have been able to bring to bear—if all of this has not been able to induce the American people to support this law, then it is not the socialists who are opposing this law who are traitors to this nation, if this is a democratic nation—it is not the socialists who are unpatriotic—it is not the socialists who do not stand for democracy—but it is the government and the President who put the law on the statute books that deserves the utmost condemnation of every free-thinking man and woman of this country.

Let me go a step further in the duty of the hour, in the thing that we as workers must do to carry on this fight to a successful conclusion. Our power as an organized mass—our power as an unorganized mass, I should say, as individuals, does not amount to a great deal, but if the five thousand or more men and women who are within the reach of my voice organize their power, then, before

the election day comes, they can sweep this city and establish real democracy through a working class government. The socialist party gives you the opportunity to do this work. It is ready to be the nucleus around which the men and women who are inspired by the ideal of freedom, the ideal of democracy, the ideal of liberty, can gather—around which they can knit together their power  
167 and win this victory.

And so we ask those of you who are in attendance, we ask those of you who are in this fight, to join the organized socialist movement in the city of Cleveland, so that together we may end Czarism and autocracy in the city of Cleveland and the nation as well. And this is the way to do it. Here are application cards for membership in the socialist party. It is a card which every man and woman—pass them around, comrades. Just a minute and I will continue—a card which every man and woman who joins the socialist party signs. It reads as follows: this is the pledge for working class people—

I started to take that and did not finish.

The Court: That is all you took?

The Witness: No, I took more.

Mr. Sharts: Read what you took.

The Witness: I scratched some of it out and do not know whether I can make it out.

The Court: Read what you have.

A. (Continuing:) Sign that and become a dues-paying member of the organization of this city. They are banded together to carry on this fight. The dues are 25 cents per month. If you join us, you add your strength, you add your ability to carry on this fight and bring it to a successful issue. That is the work that is now the most important for the working class of this community,  
168 to organize and sweep the present capitalist system with its autocracy, with its political Czars, with its abolition of free speech, with its refusal to abide by the Constitution of the United States—sweep this out of existence at the ballot box, and establish a working class movement—a working class government as Russia has already done.

For the benefit of the ruling class of the city of Cleveland, I am here to say this afternoon that when the workers of Russia learn of the action of the government of this country in refusing passports to Morris Hillquist, Victor Berger and Algernon Lee as delegates to the International socialist conference.

(Referring to place on witness' notes.) The reason that is scratched out is this: some times I could not hear the speaker distinctly and after I got a few words more I saw I must have misunderstood him and scratched it out. The next I have here is:

They will assemble before the American embassy and demonstrate against autocracy as they did when they heard that the capitalist class of this country intended to murder Mooney in San Francisco. I again say that if word could be sent through the censorship, through the lines which to-day are the means of communication with Russia, that this afternoon in the city of Cleveland a socialist was arrested

169 for speaking to the public in support of peace and against conscription, that those Russian workers would sent Mr. Root back to America quicker than he went. (Loud applause.) For the socialists do not stand for a false democracy. The working class of Europe does not prate about democracy and then use autocracy to prevent free speech and free assemblage. The socialist party stands for the right of every man to fully and freely express his views, for the right which the Constitution of this country says the people of this country have, and for the further right which the Declaration of Independence says is the right of every people, when any government does not conserve life, and liberty and happiness, it is the right of the people to alter and change such government. (Applause.)

The socialist party believes that a government which is elected on a mandate of "He kept us out of war" and then declares war, a government which, in defiance of the Constitution (applause), and—

(Mr. Sharts refers to a place in the witness' notes.) The part Mr. Sharts is referring to is right here "it is the right of the people to alter and change such government" (applause), and then the next I have is "The socialist party," and I have a couple of words there scratched out at the time I took them. I don't know what they were.

The Court: You cannot remember what it is?

The Witness: I cannot read it. It is scratched out.

170 A. (Continuing:) The socialist party believes that a government which is elected on a mandate of "He kept us out of war" (applause) and then declared war, a government, in defiance of the Constitution and in defiance of the historical liberties of this people, puts a conscription law on the statute books—that it is the duty of the people to organize their political power to alter and change that government. And that is what we propose, if every socialist in Cleveland has to serve a term in jail as the price of doing it.

My friends, I have talked down the band and I have talked down the fife and drum, and so, as a closing word to you, go forth in the city of Cleveland and spread the word, spread the news of what has happened here this afternoon. Spread the message of socialism. Let it ring forth in every nook and corner of this community. Let every working man and woman hear this message, and then all of you—all of you who believe in freedom and democracy come to the mass meeting next Sunday on Market Square, Lorain and West 25th, and let us show the government and the autocrats where the people of the city of Cleveland stand in this matter. I thank you.

Mr. Wertz: Mr. Sharts insists on the original notes as to the other matter.

The Court: How long will it take to get your notes?

171 The Witness: It will take me five minutes to get over there and it may take me five or ten minutes, maybe a little more than that, to get them.

Mr. Wertz: We have one more witness to put on for a few questions—

The Court: You can get your notes?

The Witness: I am not dead certain that I can get them.

The Court: I am not of the opinion that your transcript is not competent even without your notes, but the objection has been made, and you will find if the notes are in existence and, if they are, produce them.

172 The fife and drum corps were at the recruiting station on the Square. The old soldiers were gathered there and were playing at the same time this socialist meeting was going on. That is, the socialist meeting was started, and they were part way through before I first heard the fife and drum corps playing. They were playing "The Star Spangled Banner."

(The witness was excused to go to his office and get his short-hand notes covering the conversation at the police station and another witness was called.)

173 Thereupon the Government, further to maintain the issues upon its part, called as a witness in its behalf, CHARLES DE WOODY, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is Charles De Woody and I am Special Agent of the Department of Justice. As a part of my duties, I caused the minutes of a meeting on the 27th of May to be taken down in short-hand by Franklin Farasey. I was present at that meeting. I have been here in the court room and heard these speeches read. The portion of it that I heard was correct, according to my recollection. I was not there on the 20th of May.

(No cross examination.)

174 Thereupon the witness, FRANKLIN H. FARASEY, resumed the witness stand and further testified as follows:

Mr. Sharts: If I have failed to do so, I want to interpose my objection at this time to the introduction of that evidence. I think I have already stated the grounds.

The Court: Yes. I will give the jury an instruction before it goes in, but your objection to its introduction as a whole will be overruled. There may be individual parts of it that may raise a separate ground than those you have stated.

(To the Jury) Gentlemen of the Jury: As I am advised, the testimony which it is now proposed to offer and which the Court will permit to be introduced in part, if not in whole, relates to a transaction in which Mr. Wagenknecht only was a party and present at the time it transpired. I am charging you that that evidence is not to be received and weighed by you for any purpose against the de-

fendants Baker and Ruthenberg, that it is to be received and weighed by you as against Wagenknecht only as bearing upon his intent and motive in the remarks and conduct which the evidence may tend to provide that he indulged in or entered upon on the 27th of May in the presence, as the evidence tends to prove, of Mr. Schue.

175 I have been able in part to find my notes which I took of the conversation that Mr. Lind and Mr. De Woody had with Mr. Wagenknecht at the jail. At the time I prepared this transcript I had the complete notes. As to the reason I cannot find the complete notes now, in the first place, it was not a full transcript of all that was said. I was in the Police Station and there had been quite a bit of talk there and Mr. De Woody turned to me and said: "I wish you would take it down" in an undertone, and I had a folded newspaper, and I took quite a bit on the newspaper, and I think I had a letter in my pocket, and I took some of it on that, and Mr. Wagenknecht turned around and said something about taking the notes, and then I sat down and took them on these papers.

The Court: What part of it is it that you do not have your original notes for—the part you took on the newspaper and on the letter?

The Witness: Yes sir.

The Court: Have you made diligent search to find such parts?

The Witness: Yes, sir.

The Court: With what result?

The Witness: I have not been able to find that part.

The Court: What has become of that part of your notes?

The Witness: I cannot tell you.

176 The Court: Have you searched in every place where they probably would be?

The Witness: Hastily, yes.

The Court: Have you any reason to believe that a further search would produce them?

The Witness: No, I have not.

The Court: Did you make a transcript of them before you lost or destroyed part of your notes?

The Witness: Yes sir.

The Court: Were those notes correctly taken at the time?

The Witness: Yes sir, to the best of my ability.

The Court: What as to the transcript that was made from that part of your notes which are missing—was that correctly made?

The Witness: That was correctly made.

The Court: Have you seen the transcript?

The Witness: Yes sir.

The Court: How long after the incident was it that you made the transcript?

The Witness: I just had time to have supper, about an hour or an hour and a half.

The Court: With that preliminary examination, I will rule that he may use such part of his notes that he has here and the transcript made under those circumstances for the part of it as to which he cannot produce his notes.

Mr. Sharts: Enter our exception.

Mr. Wertz: I would like you to read pages 7, 8, and 9, marked in this transcript.

177 The Court: The question is as to whether there was said at that time and place things that are shown in that transcript.

A. 7, 8 and 9?

Q. Yes, down to the blue mark.

Mr. Sharts: Before you read, let me ask, is this the part you had no notes for?

The Witness: I will tell you in a minute. The first I have notes of is, "Mr. Lind."

Mr. Sharts: I want to enter an exception to his reading from his transcript any part that he does have his original notes for.

Mr. Wertz: That is about the fourth or fifth page.

The Witness: (Reads.)

"Mr. Lind: How long have you been in Cleveland?

"Mr. Wagenknecht: In Cleveland? You mean live here or lately been here?"

Q. Where did this conversation take place?

A. In the police station.

Q. When?

A. The same day that the speech was made in the Square. I think that was on May 27th.

Q. Who was present?

A. Chief of Police Rowe, Inspector Smith.

Q. Mr. De Woody?

A. Mr. De Woody, I think Captain Martinec, and myself.

Q. Which one of the defendants?

178 A. Mr. Wagenknecht was the only one in the room at that time.

Q. Now, go ahead and read what you have.

A. (Reads.)

"Mr. Lind: How long have you been in Cleveland?

Mr. Wagenknecht: In Cleveland? You mean live here or lately been here?

Mr. Lind: Lived here.

Mr. Wagenknecht: Well, I have lived here for twenty years, I went out west and then came back here. Do you want to know the whole time, or just the latter part of my stay?

Mr. Lind: Yes.

Mr. Wagenknecht: Well, I've been in Cleveland since 1917, 1913, I believe.

Mr. Lind: Four years?

Mr. Wagenknecht: Yes.

Mr. Lind: You are a citizen, of course?

Mr. Wagenknecht: Sure.

Mr. De Woody: Where do you vote, Mr. Wagenknecht?

Mr. Wagenknecht: Well, I voted in Lakewood.

Mr. De Woody: Is that your residence, 1291 Cook Avenue?

Mr. Wagenknecht: Yes.

Mr. De Woody: Who lives there with you? Your family?

Mr. Wagenknecht: Yes.

Mr. Lind: This fellow, what's his name, here, kind of upset the dope, didn't he?

Mr. Wagenknecht: Hayes?

Mr. Lind: Yes.

179 Mr. Wagenknecht: Well, he has been a little away from the Party activities, and he didn't understand the Party. He has taken the same stand that the labor unions generally have taken.

Mr. Lind: Well, he, in other words, doesn't believe that the right of free speech goes as far as you do. He evidently doesn't believe in advocating the violation of the law, and that's where he differs from you.

Mr. Wagenknecht: Yes.

Mr. Lind: You advised them over there this afternoon that there was two things they could do, either register and go to war or else refuse to register and go to jail? You said that over there, didn't you?

Mr. Wagenknecht: Now, I'm not saying if I said that at all. You heard what I said.

Mr. Lind: Well, I am just asking you.

Mr. Wagenknecht: Well, I am not answering.

Mr. De Woody: Where were you born?

Mr. Wagenknecht: I was born in Germany.

Mr. De Woody: Germany?

Mr. Wagenknecht: Yes.

Mr. De Woody: How long did you live in Germany?

Mr. Wagenknecht: A year and a quarter or a year and a half, something like that.

Mr. De Woody: And were you then brought to the United States?

180 Mr. Wagenknecht: Yes, I was brought to the United States. What is your name?

Mr. De Woody: De Woody is my name.

Mr. Wagenknecht: I am glad to meet you. You were taking short hand notes this afternoon?

Mr. Lind: No, this is the man you were referring to.

Mr. Wagenknecht: Well what's the charge?

Mr. Lind: What's the charge against you?

Mr. Wagenknecht: Yes."

Mr. Wertz: I think that is all we care for.

#### Cross-examination.

By Mr. Sharts:

All of the things that I have read are some of the notes that I took on that newspaper and on that back of an envelope, unless it would be that there is another sheet I do not find. I do not know what charge was preferred against Mr. Wagenknecht at the police station at the time he was arrested, or if there was any at all.

I used the Success system of shorthand. It is based on the Ben Pitman system. It follows the old Ben Pitman system of positions

above, on and below the line. If a mark is above the line, it represents a certain vowel, if it is on the line, it represents another vowel, and if it is below the line, it represents still a third vowel. If the mark is made above the line, it may me "ah," if it is on the line "oh" if it is under the line "uh." In order to take this system properly, you should have ruled lines. That is the ideal way to take it. How-

ever, it is not necessary. When you do not have lined paper, 181 you would find your position by the word immediately preceding.

That is, you would throw your next mark a little higher up, if you wished to indicate the first position, and, if you wished to change the vowel a little below. That is the method by which I indicate the vowel sounds, and read the notes afterwards. If it is above that imaginary line, it means one vowel to me, and if it is below, it means another.

I recall the speech of Mr. Wagenknecht that I took. I will give you the reason, if you wish. It is because he referred to me so particularly and there was a large crowd, a tremendous crowd. We got there, in the first place, very late, and we had to elbow our way through the crowd, and we seemed to be the subject of interest of most everybody there, and I think I recall everything that happened or occurred there. After he called attention to me and drew the eyes of the crowd upon me, I certainly was struck with that particular part of his remarks. He did not embarrass me or put me in an embarrassing position. I would call it rather conspicuous, more conspicuous than I like to be. I mean there were lots of other places I would rather have been right at that time than right there.

We stood to east and south of the speaker, I would say from ten to fifteen feet. Maybe it is twenty and maybe it is eighteen. This occurred in the Public Square. Mr. Wagenknecht was speaking from the rostrum, that is, about the southerly end of the American

Trust Building. If the southerly side of the American Trust 182 Building were to be projected out, I think it would be about on that line, and also about on a line with the westerly part of the recruiting station, if that were to be projected. With reference to the Tom Johnson statue down there, the statue was with its back to us. I cannot tell you of my own knowledge how much of a crowd was there. I saw the crowd in going in, not after that. I would say there were probably 3000 people there. I may be away off on that. They stretched out about just up to the sidewalk. I think the sidewalk was clear. I think the rostrum is about five or six feet in from the sidewalk. The crowd was all in front, and either side of the platform.

I took down Mr. Hayes' remarks in part, not all. When I was taking down Mr. Wagenknecht's remarks, he was standing on the rostrum and facing in toward Tom Johnson's Statue. If anything, I was slightly to the platform's right, but almost directly in front of him. I went with Mr. De Woody. We stood in front of the Marshall Building, and later on I looked up and saw Mr. Lind, and also there were a couple of police officers there. I am sure this was the meeting of May 27th. After Mr. Hayes had finished speaking, the next speaker followed him immediately. My memory is that he was

introduced by the chairman of the meeting, who Mr. Wagenknecht said was Mr. Hitchcock. Mr. Hitchcock didn't talk for any time.

When Mr. Wagenknecht began to talk he faced about in the direction of the Tom Johnson Statute. The crowd extended 183 in front, and on his left hand and on his right hand. As he talked, he did not talk entirely in one direction. He would just turn slightly to either side. He would throw his voice in that direction for a while and then in this direction (indicating). He spoke, I would say, 99 per cent of his words almost directly in front of him. This crowd was all around. I was packed in there very tight. The crowd was demonstrative during the time I was taking the notes of Mr. Wagenknecht's speech. They were applauding. I omitted to read the applause notes as I was giving Mr. Wagenknecht's speech. I have those notes. Upon examining the notes I find he was interrupted by applause eight times. I cannot tell you how long he spoke. As just a rough guess, I would say from ten to fifteen minutes. I would not say he was interrupted with the applause. The applause would come when he would pause himself at the end of a sentence or at a stopping place. I cannot say that he ever was really interrupted, but possibly once, when his voice was drowned out by applause. He may have been talking at other times when the applause was going on, but I think it was more often that the speaker reach a stopping place and then the applause would follow.

I got my first training in shorthand at the Spencerian School here in Cleveland. I think it was the year 1910. I was twenty years old then. I am now almost 27. I spent a year at the Spencerian, and then I studied by correspondence through the Success School for another year. That was two years. At that time I was with 184 the Secretary of State. Then I quit my position with the Secretary of State and went to Chicago and finished there at Chicago at the Success School. That is the third year. I began taking shorthand of speeches five years ago. It is very seldom I reported speeches before I started to work as a court stenographer. I did, however, report President Wilson's speech, and I reported various speeches for the Constitutional Convention of Ohio for my own self and for friends of mine and for practice. I think I reported most of them for the Secretary of State of Ohio. I have been engaged in the work of shorthand steadily ever since. I have worked at shorthand for seven years. About five years ago I started reporting. In this county we have no official stenographers, so that I cannot say that I have ever held a position of court stenographer. In Cuyahoga County each stenographer operates in a similar fashion to attorneys; that is, he maintains his own office and his own office force and is employed directly by the attorneys and paid by their clients, not by the court or the county or the city. I have been doing court room work for five years, exclusively here in Cuyahoga County, in all courts except this one. I am not working for any one right at this minute. I have done quite a little work for the Coach Detective Agency. I think I have done work for possibly five or six different detective agencies in different parts of the country.

185 My attention was first called to the job of reporting these men when I got home on the Saturday night before that. There was a call there that my mother had left for me, on the telephone, and I called up that number, and it was Mr. De Woody, and he asked me what I was going to do the next day and if I would report these speeches for the Department of Justice. I had met Mr. DeWoody before, but had not done work for him before. He never made any previous arrangements with me. When I went to work to report this meeting, I arrived at Marshall's at about a quarter to two, and when I started to take the speeches, it was almost an hour later. I am not certain about that. At that time there was a large crowd and I had to work my way through the crowd. When I started to take notes, I did not have anything to rest my book on. I just stood there with a book in one hand and worked that way. At first people were pressing against me, I do not think at any time that I had to ask anyone what the speaker said. I do remember that at one time during the speeches, I turned around to Mr. DeWoody, I think, and asked him what the speaker said, and he said he did not get it. My recollection is that the crowd started to applaud before the speaker had finished his sentence and I did not hear it that time. I have given a literal rendering of Mr. Wagenknecht's speech as I heard it. There is nothing in my notes to indicate the place where I could not hear what he was saying. My recollection is that I just omitted the place where I did not hear.

I also reported the speech of Mr. Ruthenberg. There are a number of places in my notes where I have drawn a line through parts of the notes that I started to take. That was because of the particularly poor quality of that note that was scratched out.

186 Then I would have to go back and write it over. In the meantime Mr. Ruthenberg was talking right along, but he is a very slow talker. I consider that he is exceptionally slow. I could go back and be writing down what he said and then go and catch up with what he was going on with. Sometimes you will think you understand just what the speaker said and a second later you will find that you did not quite understand it. There are a great number of these through my notes, erasures and then putting something else there. It runs through the notes of all of the speakers, because I was standing up like this (indicating) and working with the arm free, no support for my hand, and in the midst of a large crowd, which was continually bumping me in the front and in the back, and I was writing part of the time with a steel pen and part of the time with a fountain pen, and part of the time I got my book up like this (indicating) and the ink would not flow up the pen, and then I would have to stoop over again until I would get it to flow back again, and then back up again, until I could write better. I was doing that continually during these two speeches. I think at one time I rested my book on Mr. DeWoody. I got along fine until he moved over or something. I will say that those notes are just as I heard the men speak, and just as I put them down.

When I went to the police station I was carrying my note book in my hand, I think. At the police station there was present the

187 Chief of Police, Inspector Smith, Mr. DeWoody and Mr. Lind. I don't know as there was anyone else. It is my recollection there was no other officer sitting there, but I will not say that for sure. The room in the police station in which I went was the second room away from the Chief's private office. All of these men were not in there surrounding Wagenknecht. Mr. Wagenknecht was standing. Mr. Lind was sitting at a desk. The others were walking around the room, or sitting down. Mr. De Woody asked him some question, and also Mr. Lind. One would ask him and then another would ask him and so on. My notes show that. When I came in, I think I sat down. I think I was there before Mr. Wagenknecht came in, that is, in the room before he came in that room. After the arrest I remained to take Mr. Ruthenberg's speech before I went down to the station. I do not think the Chief of Police asked any question. I have no recollection that Inspector Smith asked any. When I was taking notes on the newspaper I had it in my hand rolled up and was writing along the margin of the paper, holding it in one hand. There were no lines on it at all. When I had exhausted that margin, I pulled out an envelope and just used the back of that. There were no lines on the envelope. I just held it in my hand. I do not think it was a stiff envelope. I think it was just a plain ordinary envelope. I completely used that up. By that time I discovered Mr. Wagenknecht knew I was taking notes and I no longer made any concealment of it.

188 There were times when I was taking the speeches when the ink would refuse to flow from my pen and at those times I had to bend over and then it immediately began to flow. I did not have any delay when it failed to flow. I never had an experience of that kind before. I was working under very unusual difficulties, the most difficult I have ever experienced.

Mr. Wertz: We rest.

The Court: The general denial tendered by the District Attorney this afternoon I will permit to be filed in accordance with the leave that was asked and given yesterday, Mr. Sharts. I have had the stenographer transcribe what occurred. You may have an exception.

Mr. Sharts: Our exceptions are in.

(Adjournment to July 20, 1917, 9:00 A. M.)

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(July 20, 1917—9:00 A. M.)

Mr. Wertz: The Government rests.

Mr. Sharts: If your Honor please, I wish at this time to make a motion to have the Court take the case from the jury and instruct a verdict for the defense upon the ground that the Government has failed to establish all of the essential facts of the indictment. I base my contention chiefly upon this fact: it is an established rule of evidence that the uncorroborated testimony of an accomplice is not sufficient to convict. In this case we have had an abundance of tes-

timony regarding speeches that were made. We have had abundant testimony of a leaflet that was circulated prior to the passing of this Act. There has been abundant testimony along these lines, but, when it comes to the specific offense charged in the indictment, that these men aided, abetted, counseled, and procured Mr. Schue to fail to register, we have absolutely nothing to support his statement, either that he was there, or that he was influenced. He says he was there. He has given a few extracts, garbled phrases of extracts of speeches that he had heard, and claims that he had heard, and he says that he was influenced by that to refuse to register. Here was a man who lived here, and as he said, had been born in this city, was a machinist, was presumed to have some acquaintances, and he attended the meetings, he says, of May 20th and May 27th, and he stood there, on the latter occasion for something like two 190 hours. On neither of these occasions could he name a single man that he had met who could corroborate his statement that he was there, nor could the Government produce a single person who could bear him out in his statement that he was there, so that, from the essential fact of this indictment, the aiding, abetting, and counseling of Mr. Schue not to register, there is absolutely nothing but his unsupported word.

Now, I maintain that, in his undertaking to show that he was there even, he has indicated a number of things that would tend to the conclusion that he was not there. He estimated the crowd on the first occasion to be—he said that he could not say whether it was 100 or 500 people—and you have heard the testimony of the officer who was there, Mr. Stucky, that there were about 1500 people, and it was otherwise estimated at about 2,000 people. It seems to me also that in his inability to say exactly about the other meetings that were being held upon the Square at the time he showed a remarkable vagueness of recollection, and altogether his story was one that could be very easily devised for the purpose of obtaining his own release from the punishment for his offense. I think it could be very easily constructed, that story, the details, so far as he gave them, and so I will rest my motion chiefly upon that ground. I claim, however, that the Government has failed entirely to show that these men have in their speeches or in any other way 191 used language that to any reasonable mind would have been a request for them or a solicitation for them not to register.

Thereupon the motion was argued to the court, and the court, upon consideration thereof, overruled the same, to which action of the court the defendants duly excepted.

192 Thereupon the defendants, to maintain the issues upon their part, called as a witness in their behalf, AMOS L. HITCHCOCK, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Amos Linden Hitchcock. I will be forty-one this Fall. My occupation, carpenter. I was born on Put-in-Bay Island  
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in Ottawa county, this state. I have been all over the United States since then. I have lived in the city of Cleveland since 1903.

I attended a meeting on the Public Square in the month of May in which Charles Baker was a speaker. That was at the rostrum on the Public Square adjacent to the recruiting booth there now. The recruiting booth was not there at that time. When Mr. Baker was speaking at that meeting, I was kind of circulating around the crowd. At no time except for a few minutes was I anywhere close to the rostrum that day. I heard only part of his speech. I do not recall the particular part in which he discussed conscription and registration. There were several hundred people in the crowd. It was a rainy day, and, of course, the crowd was small. We stood in the rain. I believe I attended a meeting on May 13th. If that was on a Sunday and there was a meeting on the Public Square, I was there. I do not recall Mr. Baker speaking on the Public Square except that once. I attended a meeting later on the Public Square on the Sunday after Baker spoke. As near as I can recall

that was the 27th of May. I was chairman of that meeting.

193 The speakers were Max Hayes, Ruthenberg and Wagenknecht. Max Hayes spoke first. After him Wagenknecht and following him, to the adjournment, Mr. Ruthenberg. I remained throughout the entire meeting. I was within arm's length of the speakers at that meeting. In my judgment, there were probably three or four thousand in the crowd at that time. The crowd was standing entirely around the rostrum. Both of them were on the park side, the Square side. There were some back of the rostrum on the sidewalk. When Mr. Wagenknecht was speaking, he faced to the east. Max Hayes was speaking when we arrived there. I was a little bit tardy and Hayes was a little bit early, and on account of there only being one rostrum, he started the meeting early in order to hold that rostrum. There was another party who had been using it right along and we wanted that time. The other party was some man talking on a religious feature that he was fostering in Benton Harbor, Michigan. There was no other meeting going on at the time that our meeting was being held. At the recruiting booth which had been built just previous there was music and a speaker spoke for a few minutes. The music was fife and drum music. That was the only other meeting that I noticed. It was while Ruthenberg was speaking this music started up.

Q. I wish you would state now what you heard Mr. Wagenknecht say? Give as clear a summary of his talk as you can, of what he discussed and the effect it made upon you, what you remember?

The Court: I do not think you mean the effect, but, as I 194 interpret your question, it is for the witness to state literally, if he can, and, if not, the exact substance so far as he can now recall it, what he said.

A. This matter of remembering those things strikes people differently. I am used to attending these meetings, and I hear prac-

tically the same thing a great many times and do not pay so very much attention to it. I had duties to perform at that meeting and I knew practically what the man was going to talk about, that is, in a degree, and I do not pay so very much attention to their exact words. The purpose of our going there was in opposition to the war, and we were in a campaign—

The Court: Just a moment. He is beyond your question.

Q. I wish you would try to state what you heard Mr. Wagenknecht say. I do not suppose you can give the exact words, I do not ask it of you where you cannot—give the line of his argument and discussion.

The Court: Give the substance of what he said.

A. He, of course, made the assertions that we were there in the interests of peace, that we did not want war, and that we were going to continue fighting until peace was attained. That was the substance of what he said, as near as I can recall.

Q. What did he say about registration?

A. He did not like the registration and believed that it ought to be repealed.

Q. Did he use the word "repealed"?

A. He might not or might have said "repealed," but 195 whatever term he used was to that effect, until Congress rescinded it or until it was repealed, or words to that effect.

Q. Did he advise anybody to register or not to register?

A. Not that I recall, no advice of that character.

Q. No advice of that character?

A. No, sir.

Q. Did he advise any opposition to the conscription law in the way of refusing to obey the law?

A. No, sir.

Mr. Wertz: If the Court please, I would like to interpose an objection here. He should ask what was said or done there.

The Court: Yes. Both last questions were objectionable. I will sustain the objection.

Mr. Wagenknecht spoke from a few minutes to four until a few minutes past four. There was a stenographer in the crowd. He stood almost in front of the rostrum, possibly 15 feet away, maybe not so far. I did not take particular observation of him, while Mr. Wagenknecht was talking. In fact, I could not see him except when I was on top of the rostrum. There were a number of police officers around at the time. I am not acquainted with Mr. Lind, the police prosecutor. Mr. Wagenknecht's speech ended abruptly. I do not recall his exact words but it was in opposition to the conscription, wherein he said that the only way they had of registering protest was either by observing the law or not, it was optional with them, it was up to you, and at that time an officer came around the back of the rostrum and just wiggled his finger, and that ended it. After Mr. Wagenknecht was arrested,

196 I was very busy. Part of the audience undertook to follow the officer and Wagenknecht away and my duties then was to get them back there to their meeting and to advise them not to leave the place but to remain and hear the next speaker.

The next speaker was Mr. Ruthenberg. He began to talk about four o'clock or a few moments after. He talked probably forty or forty-five minutes. During that time I did not notice the stenographer. While Mr. Ruthenberg was talking I gave no more close attention than I did to the previous speaker. There are only a few things that I recall particularly of his talk. The first was that he was going to make his speech as he had intended regardless of the fact that the former speaker had been arrested, and he went into the constitution, quoted from that and quoted from a speech Daniel Webster made in regard to the draft law during the Civil War. He made a long speech there. I could not recall that speech. With regard to registration, he said that he himself would not register. I could not say what else he said about it, I would not attempt to try to repeat what he said because I do not recall it clear enough. I cannot give anything further in his speech that I could be sure of.

Cross-examination.

By Mr. Wertz:

I heard Mr. Wagenknecht give no advice as to registration. I was present on the 13th at the hall where the resolution was adopted.

197 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf, WALTER F. BRONSTRUP, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Walter F. Bronstrup. My occupation is that of electrician. My age is 33. I was born in Cincinnati, Ohio, I am a resident of Cleveland, and have lived here since May, 1910. I was present at all the meetings on the Public Square in the month of May. I recall a meeting at which Mr. Baker spoke. I was in the crowd next to the rostrum, at the side. While Mr. Baker was speaking, I gave close attention to what he said. I cannot give his speech in words but the sense of his speech. I never tried to recall the speaker's exact words.

Q. Go ahead.

A. The meeting that Charles Baker, of Hamilton, spoke at upon the Square, as near as I can remember, Comrade Baker spoke against this country entering into the European War, give the cause of the war, and give the socialists' standpoint, the cure for wars, and he stated that he, being of conscription age, would refuse to be conscripted.

Q. What did he say about registration?

A. He told the people that there was a law to be passed on registration, that it was up to them to obey it or not to obey it, as they saw fit.

Q. Is that all he said on that subject?

A. Oh, he elaborated on the argument but that was the 198 sense of his argument.

Q. State what advice he gave to the crowd with regard to registering or not registering of young men of registration age?

A. He gave them no advice, if I recall correctly, whether they should register or not register. It was left up to the individual. Baker had to, as a socialist speaker, abide by the decision of the Socialist Party.

The Court: Baker had to, as a socialist speaker, to abide by the decision of the Socialist Party?

The Witness: Yes.

Q. Can you go further with your recollection of his speech?

A. That was the sense of his speech; that is all that I recall.

As to whether there is anything further that I can recall on that subject or the incidents of that meeting, I recall who the speakers were, but that is all of importance of any of the argument. Mr. Baker began speaking about a quarter past three or half past three. He must have talked for an hour. During that time we had a crowd that I should judge would be close to 3,500 people. It was clear weather at the time. The only noise that interfered with the speaker or the speaking or hearing of any of the speeches was applause. There was frequent applause. At times it lasted for a few minutes and at times only a burst. The street cars were running but if one is close enough to the speaker they do not interfere. A man standing ten feet away could not hear all the time. I did not observe any police prosecutor or officer of that sort that I know of in the crowd.

199 I was present at another meeting in the Public Square later than the Baker meeting. I was present the following meeting and a previous meeting. The week following the speakers were Hayes and Wagenknecht and Ruthenberg. Hayes was talking before I came. I got there at 2:30. I did not hear any part of his speech. I arrived just before Hayes got down off of the platform. I heard Wagenknecht's speech. While Wagenknecht talked I was standing about ten feet in back of the rostrum. During the time he was talking at times I could not hear all of it. I did not pay much attention to Comrade Wagenknecht's talk, but from the drift that I heard, it was that he spoke against conscription. The advice that he gave to the crowd in regard to registration was that it was up to the individual to register if he wished to or not. I did not pay much attention to what he said in regard to conscription. I don't know whether he mentioned conscription. I cannot recall anything else he said. After his remarks the police officer walked up to the rostrum and asked him or seemingly asked him to come down off of the rostrum. Anyway, he got down and the police officer took him out of the crowd. Almost a riot followed his removal. When Comrade Wagen-

knecht was taken off of the rostrum by the policeman it seems as though the crowd resented his arrest and they rushed after the police, and the chairman of the meeting jumped on the rostrum and advised and hollered at the crowd there through a megaphone 200 to remain here, to leave Wagenknecht go to the police station, that this was their meeting and for them to be quiet and come back and listen to the other speakers. After that the chairman announced the next speaker who was Ruthenberg. Mr. Rutherford first called the attention of the crowd to the act that was just committed. He cited that it was in violation of our constitutional rights, the right of free speech, and then proceeded on a lecture giving the cause and horrors of war and the socialist position as to conscription. He stated that the position was that the Socialist Party was opposed to all wars and that the Socialist Party, that is, the members of the Socialist Party would not be conscripted, that is, those that held the Socialist Party dear, and he stated that he personally as an individual would rather be shot than to be conscripted. As to what he said about registering, he left it up to the individual to register or not to register. That is all I recall of his remarks at present. I am almost certain that there was a religious meeting being held on the other corner of the Square at that time. There were other sounds made by the street cars, and the recruiting station had some music by a fife and drum corps. It was playing during Ruthenberg's talk.

I noticed a stenographer while I was there. He stood to the left of the speaker. I noticed that he was taking notes and talking to some other individual—two, one on each side of him. I noticed him 201 talking to them about four or five times during the meeting.

(Mr. Schue stands up.) I never saw that man (indicating defendant Schue). I did not see him at either of those meetings.

#### Cross-examination.

By Mr. Wertz:

I am an active socialist and I attended all of the meetings. As to the meeting on the 27th, on the occasion when Mr. Wagenknecht was placed under arrest, I could not hear all of it. I remember some of his remarks against conscription. The impression Mr. Wagenknecht left with me was that it was up to the individual if they wanted to register or not. That is the impression both of them left. I have told all I remember of these different speeches at that time.

I do not recall that Ruthenberg said in his speech: "We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the Billy Sunday form of revivalism to induce you to register for conscription. They are afraid." I do not recall Ruthenberg's saying: "They are afraid that the working class of this community may on registration day enact their own referendum in regard to this law by refusing to register."

I do not recall that Mr. Ruthenberg said: "What is to be the posi-

tion of the working class of this nation in regard to war and registration for conscription?"

202 I do not recall his saying immediately following the above:

"Are we in this country, having been bludgeoned—no other word describes it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the President and Congress was elected—are we to meekly submit and lie down and permit the ruling classes to do its evil, base, dirty work?"

I said in regard to Mr. Baker that I knew that Baker did not say anything against conscription because Baker had to, as a socialist speaker, abide by the decision of the Socialist Party. What I mean by this is, that when we send out speakers they have got to abide by the constitution and by-laws adopted by the Socialist Party; otherwise they would be recalled. That does not include resolutions adopted by the Socialist Party.

I cannot find anything in the by-laws of the Socialist Party that prevents Baker from making a speech against registration and conscription.

I have heard of the resolution that was adopted on the 13th of May: "Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing 'involuntary servitude,' in violation of the 13th Amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the Party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class." That 203 resolution was not binding on Comrade Baker. I do not recall whether this resolution was mentioned in the speaking of Baker, of Wagenknecht or Ruthenberg.

I do not recall this in Mr. Ruthenberg's speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription. We have taken this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country to enact any laws which are intended to force submission of the people to involuntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law." I suppose that possibly that was stated. If those are the reports of the meeting, I suppose I did hear that in substance.

As to the following language, I remember statements similar to that made by Mr. Ruthenberg. It was in that speech, but whether at the Square or some place else I do not know; "And so the Socialist party of the City of Cleveland by resolution has gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is

204 just as wrong as the murder of an individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow human beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the Socialist Party that we urge and recommend that they refuse to be registered for conscription."

I do not remember hearing the following statement: "My friends, I am ready to say more: That if this law is amended, if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the millions against the socialists on the battle fields of Europe, if, after the first million or two of the flower of the humanity of this country has become the victims of the ruling class in their insensate greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends this law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted." I may have heard it in substance; I don't remember.

I do not recall the following statement or the substance of it: "I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made. I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder. I would be saying little to you if I left 205 you only with this message. If I only told you that we socialists did not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete. What are we to do? What are we to do? What have we the power to do? My friends, let me say first and foremost that the one thing which we must not do in this crisis—we of the working class must not resort to any kind of force. Let us willingly and gladly go to jail rather than to the trenches."

I do not recall this statement: "Come over to Market Square at Lorain and 25th and we will again present to you the facts of the betrayal of the people of this country by its servants in declaring war and placing a conscription law on the statute books."

I do not recall the following statement in Mr. Wagenknecht's speech: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the Socialist Party of the United States, and, not agreeing with the official action of the Socialist Party of the United States, we must say this afternoon Max Hayes does not speak for the Socialist Party. The Socialist Party has taken a very definite and decided stand upon this matter of registration for conscription."

I did not learn that Max Hayes had advised the audience that it was their duty as American citizens to obey that law and register under it, prior to the speech of Wagenknecht. I heard it later. 206 Whether it is the truth or not, I could not say; I wasn't there; I didn't hear it.

I do not recall the following statement by Mr. Wagenknecht:

"The National Convention of the Socialist Party went on record and declared that it shall be the duty of every dues-paying member of the Socialist Party to fight and fight and fight and fight until there is no more fight left in them against conscription whenever and wherever he can."

I do not recall this in his speech: "And we are going to fight. We don't intend laying down on the job at this time, just because our capitalistic government, controlled by the Rockefellers and Morgans, say to us, 'You shall do so and so.'"

I do not recall this in Mr. Wagenknecht's speech: "Now, the socialists don't care a shoop in hell which capitalistic class is the most powerful in this world. All we care about is that we shall make the working class of every country the most powerful in that country."

I do not recall this of Wagenknecht's speech: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, 'The time is come when we, through organized power and strength, must say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'"

207 I do not recall this statement: "Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, you understand, in this movement for working class liberty, but then somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand. And so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription. You can either register and run a chance of being drafted, or you can refuse to register and go to jail."

P. Do you recall that after that statement there was much applause and cries of "Jail, jail" from the audience?

A. No, sir.

Q. Do you remember of the audience calling "Jail, jail" at all during that speech, do you recall that?

A. No, sir, I do not recall.

Q. Do you recall this: "Now, you have a right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has a right to say that you shall register and go to murder." Then there was loud applause. Do you recall that?

208 A. I do not recall.

Q. Do you recall this? "Well, the question is, of course, you may applaud this afternoon, but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th; that's the question, friends. The conscription law and its success, understand—the conscription law and

its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? A man—a man within the age limits—any man—any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest. There are subsequent ways to protest, but this is the first place to protest." Do you recall that in Wagenknecht's speech?

A. No sir.

Q. Do you recall this being in Mr. Wagenknecht's speech: "Now, then, we are here this afternoon to explain the situation to you. What we say this afternoon is this: That every man has the right to do one of two things; and I want to repeat that. He has the right to do one of two things. He can either refuse to register and run a chance of going to jail—" Do you recall that just before 209 he was arrested?

A. No sir.

Redirect examination.

By Mr. Sharts:

The pamphlet you hand me is the constitution and by-laws of the Socialist Party. The pledge in there is the pledge that is taken by the members of the socialist organization.

Q. I wish you would read that pledge to the jury.

Mr. Wertz: If the court please, I object.

The Court: I sustain the objection to it on the ground of immateriality and irrelevancy.

Mr. Sharts: Enter an exception.

210 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf, JOHN A. FROMHOLTZ who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is John A. Fromholtz. My age is 29. I was born in Buffalo, N. Y. and lived about twenty years in Buffalo and nine years in Cleveland. I am within the registration age, and have registered. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have not consulted Mr. Ruthenberg regarding registration.

I attended meetings on May 20th and May 27th in the Public Square. I recall the speech of Mr. Baker.

Q. I wish you would give us as well as you can the speech of Mr. Baker, what you got from it, the substance of it, as well as you can?

A. As much as I know, the main thing was sort of conscription.

I don't know anything he said I should not register because always—

The Court: Repeat what he said in substance as well as you recollect.

Q. Go ahead.

A. As much as I can say is that he says the Socialist Party was opposed to conscription but there is nothing to hinder me—there is nothing that I know of that he said that the people should not register.

Q. That is, you say that he did not say anything about registration?

211 A. Yes, sir.

I am a member of the Socialist Party. I attended the meeting on May 27th. At the meeting there, Mr. Wagenknecht was chairman, I think, and Mr. Ruthenberg, and, I think, Mr. Hayes were speakers. Mr. Hayes spoke first. He stated pretty nearly the same words as Mr. Baker, that he advised young men to register. I cannot recall the substance of Mr. Wagenknecht's speech. Mr. Ruthenberg said as much as the Socialist Party was against conscription, and not anything as to registration.

Cross-examination.

By Mr. Wertz:

I have been in the witness room today. The boys out there who are witnesses have not been talking over what this law suit was about. I did not discuss with any of them the testimony to be offered on the witness stand. Nobody talked with me about what I was — testify about. I never spoke to Mr. Ruthenberg at all. I just came here this morning. I never talked to their lawyers about it as to what I should say. I did not tell them what I was going to testify to at all. I am in the electrical business. I recall the speech of Max Hayes and that Max Hayes said to the audience over there that while they were opposed to this conscription law, yet that that law required all citizens of this country to register for conscription, and that while that law was on the statute book it was their 212 duty to go and register under that law, and he further told us that while they were opposed to the law, that the proper way to get away from that law was to have that law repealed in Congress, and not to violate that law by refusing to register. I am positive that Max Hayes said that.

Q. Do you recall that Wagenknecht said this, in introducing himself to that audience: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes does not quite agree with the official action of the Socialist Party of the United States," applause. Do you remember that?

A. I think I remember that sentence.

The Court: You think you do?

The Witness: Yes, sir.

The Court: As made by Mr. Wagenknecht? Do you understand it?

The Witness: Yes, sir.

Q. Do you remember this immediately following: "And, not agreeing with the official action of the Socialist Party of the United States, we will say that this afternoon Max Hayes does not speak for the Socialist Party." Applause?

A. I could not state that I heard that.

Q. Did you hear that in substance?

A. Because at times he was interrupted

Q. You would not say that it was not said there?

A. No, sir.

Q. Then did you hear this statement immediately following:  
213 "The Socialist Party has taken a very definite and decided  
stand upon this matter of registration for conscription."  
Did you hear that?

A. No, sir.

Q. Did you hear that in substance?

A. No, sir. At times I had to move into the audience in order to hear some sentences.

Q. So that you would not say that it was not said?

A. I would not say.

Q. Did you hear this: "The National Convention of the Socialist Party went on record and declared that it shall be the duty of every dues-paying member of the Socialist Party to fight and fight and fight and fight until there is no more fight left in them against conscription whenever and wherever he can," applause. Do you remember that?

A. I may have heard some of that statement. I could not say for sure, because I just know—my memory is not whole clear on that now.

Q. Do you remember this: "And we are going to fight. We don't intend laying down on the job at this time just because our capitalistic government, controlled by the Rockefellers and the Morgans, say to us, 'You shall do so and so,'"? Do you remember that?

A. I think I remember that. Yes, I remember that sentence.

Q. Then, do you recall this from Comrade Wagenknecht: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at 214 last stand up like men and say, 'The time has come when we, through organized power and strength, say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'" Do you remember that?

A. Yes.

Q. Do you recall this from Wagenknecht: "You can either register and run a chance of being drafted, or you can refuse to register and go to jail." Applause and cries of "Jail, jail." Do you remember that?

A. Yes.

Q. Do you recall that Mr. Wagenknecht made this statement following that: "Now, you have a right to go to jail, don't you know. You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has the right to say that you shall register and go to murder." Loud applause?

A. Yes, sir.

Q. Do you recall that?

A. Yes, sir.

The Court: Your answer was that you say you recall that as having been said?

The Witness: Yes, sir.

Q. Do you recall this statement by Wagenknecht: "Well, the question is, of course, you may applaud here this afternoon, but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th?"?

215 A. I could not say that I heard that.

Q. Did you hear that in substance?

A. No, sir.

Q. Does it occur to you that if that was said, the subject of that speech by Wagenknecht was refusing to register instead of conscription?

A. No, because if he stated that and I followed it I would not have registered, and I registered.

Q. So that you did not hear that over there?

A. No, sir.

Q. Do you recall hearing this: "The conscription law and its success, understand—the conscription law and its success, depends in a measure upon the fact that thousands upon thousands will refuse to register." Do you recall that?

A. I do not recall that statement.

Q. Do you recall this statement: "A man within the age limits, any man, any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register. That is the first place to protest." Do you recall that?

A. No, sir.

Q. Do you recall that statement in substance?

A. No, sir, I do not recall it.

Q. Do you say that that statement was not made there by Mr. Wagenknecht?

216 A. I could not say that he made that statement. I did not speak to any person about it. I just moved through the audience at different times. I never stayed one place on account of the difficulty of hearing. Sometimes I got up in front and at other times I was forced back further by other people getting in front of me.

Q. Now, do you recall this in Mr. Ruthenberg's speech: "The capitalist classes are not fighting a war of democracy. The United

States is not fighting a war for democracy. It is, fighting a war for commercial imperialism and the profits of the capitalist class of this country." Do you recall that?

A. I do not.

Q. Would you say that it was not said there?

A. I could not say that. I did not speak to any person in regard to that lecture.

The Court: The question is whether Mr. Ruthenberg said that or said that in substance on the 27th of May on the Public Square, according to the best of your recollection?

The Witness: I can say that to my recollection, I cannot recall that statement.

Q. Do you recall this statement in Mr. Ruthenberg's speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription. We have taken this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country 217 to enact any laws which are intended to force submission of the people to involuntary servitude, and we take the position that when Congress enacts a law which is a violation of a fundamental law of the nation and the ruling class enforces that law through the courts which it controls, then the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law. (Applause.)" Do you recall that?

A. I recall that.

Q. "And so the Socialist Party of the City of Cleveland by resolution has gone on record as urging and recommending to every worker who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow-human beings no matter whether they are being called the Germans, or Austrians, or Russians, or English—whatever their nationality may be—we have said to those workers, by official action of the socialist party that we urge and recommend that they refuse to be registered for conscription."

A. I do not recall that statement at all.

Q. You do not recall that?

A. No sir.

Q. Will you say that it was not said there?

A. I cannot recall anything at all about that.

Q. Do you recall it in substance?

218 A. All I can recall in the statement is that we were opposed to wholesale murder, but not as to registration.

Q. But not as to registration? Do you recall this statement by Mr. Ruthenberg? "That if I came between the age provided for in that law, that I would refuse to register for conscription."

A. I do not recall that.

Q. Do you recall Mr. Ruthenberg saying that in substance?

A. I do not recall that.

Q. Do you recall him saying that if this law was amended so that it included his age that he would refuse to become the victim of the ruling class and be conscripted; do you recall that?

A. I cannot recall that either.

Q. Now, you say that the Socialist Party was not opposed to registration?

A. Yes, sir.

I was not up to the Socialist hall on May 13th when the resolution was adopted on the question of conscription. I was out of town. I never saw that resolution.

Redirect examination.

By Mr. Sharts:

I have had no talk with you in regard to this case. I have never talked with Mr. Wolf since or before the trial. I just arrived in town last night.

219 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf A. E. FROMHOLTZ who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is A. E. Fromholtz. I am thirty-two years of age. I was born in Buffalo. I have been living in the city of Cleveland off and on for the last ten years. My occupation is that of electrician. My brother was the witness who was just before me. I am not a member of the socialist local. I attended meetings on the Public Square in May and attended a meeting on the 20th of May. I heard Charles Baker speak.

Q. Can you tell the jury in substance what he talked of?

A. Why, I remember he said that, as a follower of Jesus Christ, that he could not kill another man, that he would not shoulder a gun.

Q. Was that just about all you remember of the speech?

A. Yes, that is about all that stands paramount in his talk.

Q. Do you recall whether or not he advised the crowd in regard to registration?

A. No, sir.

Q. Whether they should register or not?

A. No, sir.

The Court: What is your answer to that—that you do not recall whether he did, or did not?

The Witness: That I do not recall that he made a statement—the only statement I remember was that, as a follower of Jesus Christ, he could not shoulder a gun to shoot down another man. That is all that stands out in my mind.

220 Q. Do you recall any other statement at all that he made in regard to registration? Did he talk about conscription?

A. Well, inasmuch, as he could not shoulder a gun, he would refuse to be conscripted.

Q. To be conscripted?

A. Yes, sir.

I was present at the meeting on May 27th. I was there for part of the speech of Mr. Hayes. I did not hear all of that speech. I heard when he was talking of New Zealand and Australia, and then I went across the street to buy a cigar and when I got back Wagenknecht was on the stand. I heard what Wagenknecht said. I heard him make a statement that the people of the United States were not consulted on the conscription bill. About the only statement that I remember was that the people of the United States were not consulted about the conscription bill and when I came back into the crowd I had a cigar and I stood next to a woman, and I must have blown the smoke into her face and she made some remark about it, so then I went to go to the outside of the crowd, and while I was walking to the outside of the crowd Wagenknecht was pulled from the stand.

I listened to the speech of Mr. Ruthenberg that followed. I do not know as I can recall anything definite of that speech, only that he stated the cause of the war, the profits of munition manufacturers that they were making and I think that he also made

221 a statement that Root, Roosevelt, Taft and Burton signed a statement in the last campaign stating that all wars were caused or had a basis in trade and commerce, and we need not rely on the socialists making those statements, but to take them from the leaders of the republican party. I do not recall what, if anything, he said on the subject of registration. As to what he said on the subject of conscription, he said he would not go to war.

#### Cross-examination.

By Mr. Wertz:

I have testified to everything that I heard said there that I can remember.

222 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf the defendant CHARLES BAKER, who, being first duly sworn, testified as follows:

#### Direct examination.

By Mr. Sharts:

My name is Charles Baker. I am state organizer of the socialist party of Ohio. My age is 26 and I am within the registration limits. I have registered. I was born in Hamilton, Ohio and have resided there since. I first visited Cleveland last fall, spent a week here on a lecture tour, but this year I came on the 18th of May. That is the day the conscription act was passed. I had not seen

this leaflet marked "Government's Exhibit No. 2," entitled: "Down with conscription." The first speech I made after I arrived in Cleveland was when I lectured the first Thursday night on the corner of 9th and Vincent Streets. If Sunday was the 20th, then I came on the 17th. I came into the city of Cleveland on a Thursday night, either the 17th or the 18th of May, and spoke at the corner of 9th and Vincent.

I first spoke on the Public Square on May 20th, Sunday. The audience was, I should judge, between 3,000 and 4,000 people. There was noise around there, general noise on the Public Square, street cars moving and automobiles and traffic in general. The noise is greater at some times than at others. I began to speak about three o'clock, I should judge. The speech that I delivered there is a speech that I have been delivering in the state of 223 Ohio for the last four months, substantially the same thing.

Q. I will ask you, Mr. Baker, now to repeat to the jury that speech as well as you can that you delivered on the 20th of May at the Public Square?

The Court: Just testify to the jury, according to the best of your recollection, what you said on that occasion on the Public Square in that continuous speech.

224 —. My lecture was—I did not deliver it in full on that occasion, due to the fact that there were other speakers present and the program—the length of time would not permit, but the lecture that I have been delivering over the State of Ohio under the auspices of the socialist party was entitled: "The Cause and Cure of the World War" in which I took up the economic cause of the war.

The Court: We want you only to give that part of it which you repeated in the speech in the Public Square.

The Witness: That is what I was going to do. I stated that I did not deliver the entire lecture and it would not be necessary to give it all to you, as you wanted just what I remembered of what I said at this particular meeting.

I took up and showed the economic cause of the world war and the concentration of wealth in the United States. I showed that the world war has been caused by the expanding of commercialism, the development of industry. I quoted the statement of Abraham Lincoln, made fifty years ago, to the effect that he saw in the near future a crisis approaching which caused him to tremble for the safety of his country, where the wealth of the nation had become concentrated or would become concentrated in the hands of a few individuals, and through this concentration of wealth the great bulk of the American people would bow down on their knees 225 and worship the god of Mammon.

Then I quoted the report of the United States Industrial Relations Commission, which we term the latest statistics on the concentration of wealth, and showed on page 33 of Basil M. Manley's report, the Secretary of the United States Industrial Relations Commission, where the wealth in America to-day had become concentrated to such an extent that 2 per cent of the people of America

owned and controlled 50 per cent of the wealth, and 33 per cent of the population of America owned and controlled 35 per cent of the wealth, and the remaining 65 per cent of the population of America only owned and controlled 5 per cent of the wealth.

Then I went on to show what had caused this concentration of wealth, namely, the private ownership of the means of life, the tools of production and distribution, the mills, the mines, the factories, and the railroads, and the natural mineral rights of the nation, which the socialist movement claims has been placed here by the Creator or by Nature as a blessing to all mankind; that through some method these things that have been placed here for the blessing of all mankind have become vested in the hands of a group of a few individuals, and through the private ownership of these means of life upon which humanity depends collectively for its existence upon the earth, through the private ownership of these means of life, they have been enabled to exploit the working class, who must use the tools of production and distribution that they do not own.

And I quoted the Government statistics, the report of Carroll D. Wright, Labor Commissioner for 25 years, showing the portion of wages received by the working class in producing the wealth in this country, where, after producing a dollar's worth of wealth in the factories that are privately owned by the master class, the capitalistic class, they receive in actual wages 17 cents, enabling 65 per cent of the population, which is the working class, to buy off of the market, to consume and enjoy, 17 per cent *per* of the wealth that they had produced, leaving 83 per cent of the wealth to remain upon the market, and that portion which the master class does not consume in their riotous living is piled upon the market as unconsumed commodities, and it lies on the markets, and every fourth and seven years in America we witness what is known as an industrial depression. The first one I witnessed was in 1898. Being a member of the working class, I lived that entire summer on parched corn and molasses.

The Court: Is that what you told them?

The Witness: Yes, sir. I am repeating the speech. And I remembered the next panic of 1907, and the papers tell us in these 227 times that when the factories close down and thousands of men are unemployed, that there is an overproduction, and I could not see how there could be any overproduction of clothing when people were wearing rags, how there could be an overproduction of food when one-third of the school children of New York went to school every morning underfed, according to the health reports of that city, or how there could be an overproduction of any of the necessary things of life when the working people in general were depriving themselves of the necessary things of life.

So we term it not a case of overproduction, as claimed by the papers during these industrial depressions, but a case of under-consumption; that the great bulk of society that has produced this wealth had not received enough in wages to buy it off of the market and enable them to enjoy and consume it. Therefore it was an unconsumed com-

modity, and not a case of overproduction but a case of underconsumption.

And then I went on to show the peculiar state of affairs which the country is placed in every four to seven years through this so-called overproduction, that the factories close down and there are no orders go into the factories to produce any more commodities until they dispose and sell the enormous amount of commodities which has piled upon the market, and when there are no orders go into the factories to produce the working man is laid off and thousands of them are

228 unemployed, and then we find always in this peculiar state of affairs there are no orders go in to produce until they sell

what is on the market. They cannot sell what is on the market until the working people buy it. The working people cannot buy it until they get money, and they cannot get any money until the factories start to work and employ them, and the factories cannot start to work and employ them until they get orders to produce. They cannot get orders to produce until they dispose of what is on the market, and they cannot dispose of that until they get money, and so forth, and so forth. It is an endless chain.

So that the only hope is to dispose of the commodities on the market, and we have found that the working class, thousands of them, are unemployed in these industrial panics, and we find the larger metropolitan cities of America putting up soup kitchens and bread lines, and find poverty and misery running amuck throughout the homes and the districts of the working class and there is want and privation among the people who are employed, who are tramping the highways and byways of the United States seeking a place of employment where they may give their labor power to produce in order that their children at home may enjoy what they had produced, and when there is a general unemployment over the country, thousands of men unemployed—and it is a well known fact that when a person's stomach begins to growl for want of the necessary things of life, he thinks more in that state and in that condition and it is to the interest of the man who sits on the throne

229 of power, who privately owns and controls the means of life—it is to his interest to see that the general working class is kept busy and steadily employed, because, unemployed, they become more dissatisfied than ever, and, in order to keep them employed, he must keep the wheels of industry turning, and, in order to keep the wheels of industry turning, he must dispose of the commodities on the market, and, in order to dispose of the commodities on the market which are unconsumed, he is compelled to find a market, and as he cannot find a market in America, he is compelled to go out of the realms of the United States in which to find a market so as to turn in to gold those commodities which he had exploited out of the working class of this country through the private ownership of the means of life upon which mankind depends for its existence.

Then I showed that this world war is the outcome of the competitive system. It is the natural outcome of the private ownership system. That is the natural stage that we are traveling in the progress of the human race. That as the human race travels up

through the different stages in its travel from the beginning of time all through barbarism, savagery, feudalism, into capitalism, so it will naturally follow that it will have to travel on out of capitalism into the next way, the way of collective ownership or the cooperative commonwealth, as the socialist movement terms it, or the industrial 230 democracy, where the people themselves will own collectively those things upon which their life depends collectively.

I showed that the war of Europe three years ago was caused by the commercial greed, and how every war has been caused by commercial greed, the desire of one class of one nation or the individual of the nation to possess that which another nation or the class of another nation has in their possession, and the desire of commercialism to expand and dominate the markets of the world.

Then I went on to show the horrors of the European war and how this world war has been brought on, namely, that we never had a world war between all of the nations of the world until the system of private ownership had become modernly developed in all of the nations of the world, until they found that the wheels of industry and the tools of production and distribution had become developed in all of the great nations of the world, that the private ownership of the tools of production in each of these nations was exploiting the working class of their own respective nations out of billions of dollars every year, and they had to find a market to dispose of it. And we find in the year 1917 that industry developed in all of the nations of the world, and they were all sending out their industrial scouts, seeking foreign markets, and that the world 231 war has been the result of the desire of the master class of all of the nations of Europe to expand in the domination of the world market.

I went on and showed the horrors of the war and the evil conditions that prevailed and what the outcome of the war would be, and then I took up and showed the price that the working class will pay and the price that they have been paying in the trenches of this horrible world war, the murder of hundreds of thousands, the breaking of millions of homes, the breaking of the hearts of the motherhood of Europe, and the rendering of millions of children orphans, and so forth, showing the horrors of the war condition; that the price that the working class of Europe had been paying for the last three years in this war was not the purchase price of their liberty but it was the penalty price of their stupidity; that they had it in their power, as they had it in their own hands, the means of ushering in the new society, by the peaceful use of the ballot, as the socialist movement advocates, but they had rejected the idea of the socialist movement, of ushering in the new society by a peaceful way, and now they were going to pay the price upon the field of battle.

And then I went on to show how that the glories of the war and the splendor of the war that led the working class right into the trenches three years ago—that it was all drowned out of existence, that after three years of war the glories of war were not so beautiful any more and now after the war had been in existence for three years we find the working class of Russia going home and

232 demanding of the Czar why they were fighting, and the Czar, being unable to tell them, having, the same as the kings of the other nations, assisted in plunging them into the war, did not know what they were fighting for, and the result was that the working class of Russia overthrew the Czar and established the first industrial democracy and wiped out of existence in a revolution of three days the blackest autoocracy that the pages of history ever records.

I went on to show how the socialist movement in Germany, which had supported the Kaiser and the fatherland at the outbreak of this war, led by the belief that it was a war of defense, that they had to defend the fatherland--how part of the members of the socialist movement at the out-break of the war deserted the fundamental doctrines of international socialism and supported the Kaiser and the fatherland in the war at the beginning, and how now, after realizing the conditions and the state of affairs--how now they were standing up and demanding in the German reichstag for the first time in the history of that nation the overthrowing of the Kaiser and the establishment of a democracy in Germany, and how that the present war in Germany would not cease until the working class had come into their own, the same as they had in Russia.

I went on to show that Spain was *reeling* in the throes of a revolution, that China was *reeling* in the throes of a revolution, that England was having its troubles and that the king of

233 England through pressure being brought to bear, the internal strife that was caused by this world war, was going to grant Ireland its liberty and its home rule which 12 months they refused to give them, and 12 months ago, when Ireland demanded this home rule and liberty from England, the champions of Irish liberty were shot down in cold blood on the streets of Dublin, and their crime was asking for liberty from Great Britain, and instead of giving them liberty they received from Great Britain the same thing that George Washington and the thirteen American colonies received in 1776, when they asked for liberty. They received bullets from Great Britain, and the only reason that America received its liberty was that Great Britain possibly did not have enough bullets. But they had enough bullets for the Irishmen, and those who demanded liberty for Ireland were shot down in cold blood in the streets of Dublin, and now they were going to give them their liberty without asking for it. Now, the king of England is going to give them liberty when they are not even demanding it.

I showed that that was brought about through the glories of war being lost, through the working class having paid the bitter price. Now they are realizing their situation and they are going to demand something in their own interests. Then I treated the state of affairs in the United States and showed through a concentration of wealth in America, that through J. P. Morgan, while we remained as a neutral nation—America remained for three years as a neutral nation—that during this entire three years Morgan, as we were told, was the official purchasing agent of England and the allies. He not only cornered the food supplies along with his

followers and members of his own class, the food speculators, not only cornered the food supply of the market and shipped it across the pond and fed the world and starved America, but manufactured thousands and thousands of dollars' worth of munitions of war and shipped it across the pond.

I told them further that the master class of America, while America remained as a neutral country, not only shipped across the pond the millions of dollars' worth of munitions of war in order to feed the war of Europe, but also loaned them the money to buy it with. I claimed that this loan to the allies was not secured; that any money loaned for a destructive purpose never was secured, and that the only money that is secured is money which is loaned for a constructive purpose, to build up and not to tear down. Money which is loaned for a constructive purpose, to build up, is secured by that which is being built by it, but if you loan money for a destructive purpose and take as your security something already built, and then tear it down, then you lose your security.

Then I showed how it was to the interest of Morgan and the master class who had made millions of dollars out of this war, how it was to their interest that America should be engaged in this war.

235 I quoted them the records of the United States Congress, Senator Callaway of Texas, who has had it written into the records of Congress that the American financial interests sent out paid representatives and interviewed 179 newspapers of the United States with the purpose in view of purchasing their editorial columns and controlling the editorial policy in general of the daily press of the United States which molds the opinion of the American people, the same as the press of any other nation, and how, after going through an elimination process, according to Senator Callaway and the records of Congress, it was only necessary to purchase the editorial columns and policy of the 25 largest newspapers, and, according to Senator Callaway and the records of Congress, the 25 largest newspapers of America, were bought and paid for by the interests of Morgan, who has made billions of dollars out of this war while we were a neutral country, and that the daily press now is controlled, the columns, the editorials, and all articles that are written on war and military and financial and commercial and industrial matters in general, all international or national questions dealing with this war—that those articles and editorials are all written by paid representatives of the Morgan financial interests, according to Senator Callaway.

I showed them how that was a great assistance in leading the United States into this great world war, how the daily press was not voicing the sentiments of America, they were not voicing the ideals that this nation is founded on, that they were voicing the ideals and those things that were to the interests of Morgan and the master class that had purchased the daily press, and that in voicing their sentiments and those things, that was in the interest of Morgan, that it was not the interests of America, and it was not to the interests of the working class of America.

I went on to show them that the working class of America is going

to pay the price, the same as the working class of Europe had to pay the price, that we are going to pay the price of blood, broken homes, broken hearts, dying and agony, and so forth. I stated that the conscription law had been passed; that there were going to be 500,000 young men conscripted and to be sent across to the battlefields of France, and so on, and that, according to President Wilson, he expected a million men to offer up their lives under the folds of Old Glory on the field of battle, and so forth, and showed that we had entered the war to such an extent that we were going to pay the price also, and that the price that America was going to pay on the battle-fields of the world war would not be the purchase price of our liberty—our liberty has already been paid for upon the battlefields of 1776—but the price that we were going to pay in this world war was the penalty price for our stupidity, due to the fact that we have given to the master class of America—permitted them to privately own the means of life, the wheels of industry, and that they will only turn

237 the wheels of industry and turn out the necessary things of life in order to produce a profit to its private owner, and that

after they turn out these different commodities, turn the wheels of industry, then they have got to find a market in which to dispose of these commodities, and that they have been compelled to go out into the markets of the world, competing with the master class of other nations in order to wrest markets from the hands of other nations.

I then quoted an interview I had with a newspaper reporter in the city of Akron who asked me what I would *I* do, knowing that I was of conscription age—what I would do if I was drafted by the United States. She said that she heard my speech in the city of Akron. She knew that I am opposed to war, a conscientious objection to conscription and war in general, and what I would do in case I was conscripted, and I said that I would refuse to be conscripted, that I would refuse to go to war, that the party that I represented, my ideals of the socialist movement, had a different way of settling the disputes between the master class or between nations except going out on the battlefield, that we could absolutely settle them in international conferences, boards of arbitration, even under the present system; that it was not necessary to go into the field of battle, and that, if conscripted, I would refuse to go to war. She asked me then knowing—if I knew what the penalty would be. I told her that I realized that

238 the penalties for refusing to be conscripted in time of war, to refuse to answer the call of your country and go to war

and murder or possibly to be murdered—that the penalties in time of war was whatever a military court saw fit to hand down, from one day in the guard house to being lined against the guard house and shot. She asked me—"knowing this, what would you do?" I said "if I was confronted with that proposition that I hoped that at that hour I would have the courage of my convictions and that I would smilingly face the firing squad and refuse to go and murder men I had never seen in all my life," and I repeated this on the Square.

I urged nobody—a man asked me a question as to what I would

do. That is the way I put this question in. A man asked me a question, what I would do in case of conscription and I told him I would refuse to be conscripted and shoot down men I never saw, and then I gave a closing word, showing the general conduct of the world war and how we were evolving into the new era, and how that the industrial democracy, the co-operative commonwealth, as the socialist movement terms it, the collective ownership of the means of life, how it was being ushered into existence—not the way the socialist movement had planned, to the quiet and peaceful method of the ballot and the use of political action, but how it was being ushered in over the dying and mangled forms of bleeding millions who had the power in their hands to usher it in peacefully and how in the course of the next five to ten years we would be establishing the industrial democracy in the world and we would then start for the first time to living upon the basis of real and true civilization. I believe that is about all, your Honor.

A. I will ask you, Mr. Baker, if there was anything said about registration?

Mr. Kavanagh: I object.

The Court: It is quite apparent that the witness has exhausted his recollection of what he said. It is permissible for counsel to put the question as to what, if anything, in addition to what he has already said, was said on the subject of registration or of conscription or of any other subject matter, and you may go further and put to him, if you wish, the testimony of other witnesses as to what they say he said and ask him what he has to say in regard to that.

Q. You may answer that question, Mr. Baker.

A. What is the question?

The Court: What, if anything, in addition to what you have already testified was said by you on that occasion on the subject of registration or conscription.

Mr. Sharts: I asked simply about registration now.

The Court: All right.

A. I said nothing in regard to registration.

Q. Was any question asked regarding registration?

A. No, sir.

Q. In the testimony of Mr. Schue, which you heard, I believe, there was a statement made that you had said something 240 about the standpoint of the socialist party on registration. Did you make any such statement?

A. Not on the question of registration, no, sir.

Q. What were you confining your remarks to?

A. Towards the close of my lecture, along about the same time that I answered a question that a man asked in the audience: "What would you do in case of conscription?" I related to him an interview I had with a newspaper reporter in the city of Akron, which I gave in my other testimony, and then I called attention to the fact of the position of the socialist party in the national convention at

St. Louis, to which I was one of the delegates, their position on conscription, that we carry on an active campaign in opposition to conscription, and that we would do everything in our power to urge and bring about the repeal of the conscription law and the wiping of it from the statute books.

Q. I will ask you if you attended that national convention to which you were referring in your speech?

A. I did.

Q. I will ask you if you are familiar with the war program of the socialist party?

A. I am.

Q. I will ask you if this is a copy of it? (Handing paper to the witness.)

A. It is.

241 (Thereupon the said exhibit offered in evidence by counsel for defendants was marked "Defendants' Exhibit No. 1," and is hereto attached and made part hereof. Said exhibit was thereupon read in evidence to the jury by counsel for defendants.)

The speech that I delivered was based upon the program that is set forth in that exhibit. I have not advocated any principles or tactics in contradiction of that program.

Q. Have you been asked by any one what they should do in case of registration?

A. I have.

Q. By whom?

A. I was asked by three persons, members of the party from Lorain, Ohio, who came to Cleveland on Decoration Day and asked my advice, as the state organizer, what they shall do on the question of registration.

Mr. Wertz: I object.

Mr. Sharts: If your Honor please, it seems to me that the testimony is admissible at least to show the motive and purpose and consistency of the speech that he has made, to show the attitude of the speaker with regard to registration, which has been questioned.

The Court: No, I will sustain the objection to that. The charge here is a specific charge that is confined to his acts and conduct on a specific occasion when he was listened to by some person and when, it is alleged, he caused that person to violate the law and thereby made the defendant here a participant in that violation. That fact

cannot be affected by proof as to what his attitude was on 242 other and different occasions. I will sustain the objection.

Mr. Sharts: Enter the exception of the defendants.

Cross-examination.

By Mr. Wertz:

I am familiar with paragraph 2 of the proclamation or resolution of the socialist party in St. Louis which was read by Mr. Sharts, and particularly the paragraph in which it is stated: "We pledge our

selves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription." I learned after I came to Cleveland of the resolution adopted by the socialist party in Cleveland on the 13th of May, in which they suggest to socialists that they refuse to register for conscription and "Pledge to them our financial and moral support in their refusal to become the victims of the ruling class." I first heard of that during this trial.

I was not present on the 27th of May on the Public Square when Wagenknecht and Ruthenberg made their speeches. Tom Clifford and Mr. Ruthenberg spoke with me on the 20th of May. Tom Clifford did not refer to the resolution of the 13th of May. I never heard any of the speakers in the ten weeks I have been in Cleveland refer to it.

Q. What about the meeting on the 10th of June on West 25th Street—did you hear this resolution spoken of over there at that time?

Mr. Sharts: I object.

243 (Objection sustained.)

Q. Were you on the 10th of June on the West Side, on West 25th Street?

(Objection by defendant; overruled.)

Mr. Sharts: The offense that he is charged with was committed on the 5th of June.

The Court: The question is as to the intent and attitude of mind of this witness at a specific time. Now, in cross-examining him as to that, he may go further.

Mr. Sharts: Enter our exception.

Q. The Court rules you may answer the question.

A. I would like to have it repeated.

The Court: You were asked now if you were present at a meeting somewhere on the 10th of June in Cleveland.

Q. On West 25th Street.

A. I would not be sure. I was present at a few meetings over there but I would not say sure I was there on the 10th of June, the date mentioned.

The Court: Your recollection is that you were not there on the 10th of June, is that it?

The Witness: Yes, sir.

Q. Do you know where Market Square is on West 25th Street?

A. Yes, sir.

Q. You are the Charles Baker of Hamilton, Ohio?

A. Yes, sir.

Q. Do you remember of being over there at a meeting with Tom Clifford?

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—. —.

Q. And Ruthenberg or Wagenknecht?

A. Yes, sir.

Q. Do you recall now that either one of those gentlemen referred to this resolution at that time?

A. No, sir.

Q. In fact, you never heard of this Cleveland resolution until you came into this room?

A. No, sir.

Q. Did you ever see "Government's Exhibit 2" before?

A. Not until I saw it in the court here.

Q. You never saw it before?

A. No, sir.

Q. I hand you "Government's Exhibit 3" and ask you if you ever saw one of those before?

A. No, sir.

Q. You never saw that?

A. No, sir.

Q. What was it that you said about the newspapers being corrupt in your speech?

A. I quoted a record of the United States Congress, the report of Senator Callaway of Texas. His report claims that the J. P. Morgan financial interests sent out official representatives for the purpose of purchasing up and controlling the editorial policy of the daily press of the United States.

I did not use this expression in my speech: "You get your patriotism from the lying, prostituted press."

I made a speech on the 17th of May in Conneaut, Ohio.

245 Q. On the 17th of May. Did you use this statement in Conneaut—

Mr. Sharts: I want it understood, of course, that I am entering an exception to all of this line of investigation as to anything said by this defendant where Schue was not present or that occurred at any date subsequent to the date that he is charged with having aided and abetted Mr. Schue.

The Court: As an independent proposition, it might be questioned as to whether his speeches made before the passage of the law or made after the 5th of June, after the commission of the alleged offense, are admissible, but the question here is as to the intent and understanding and purpose of certain acts and speeches said to have been done and made on the 20th of May. Now, in cross-examination, counsel is not limited merely to an inquiry as to what was said at that time, if it is not entirely too remote as bearing upon his intent and behavior. He may ask that question.

(Exception by defendant.)

Q. Did you use this statement in your speech at Conneaut: "You get your patriotism from the lying, prostituted press"?

A. No, sir.

Q. Did you use that statement in substance?

A. No, sir.

Q. Did you use this statement in Cleveland, in substance:

246 "If some of your people here are drafted into the army to fight in this war against your will, there will be people here and an organization here that will be with you?"

A. No, sir.

Q. Did you use that statement at Conneaut?

A. No, sir.

As to the statement that I used in regard to myself here in Cleveland in my speech in regard to my being conscripted, the only place that I referred to myself, as to what my actions would be, was in reply to a question on the Public Square on May 20th by some man standing to my right who asked the question: "What will I do in case of conscription?" I quoted to him an interview that I had with a reporter of one of the Akron papers, to the effect that in case of conscription I would refuse to be conscripted and that I hoped that I had the moral and physical courage at that time to stand the consequence of my refusal to go out and murder people I had never seen.

I did not make the statement on the Public Square that you say Schue testified to that: "He said he would refuse to register, him being of military age" and: "He said he would rather be shot here as a man than be shot in the trenches of Europe as a dog."

I do not recall discussing the subject of registration at all on the Public Square. I never discussed the question of registration. 247 My speech was based on the cause and cure for the war, and I mentioned conscription in reply to a question a man asked me, the only time I spoke on it. The meeting was called as a so-called peace meeting, and I was there discussing the causes and cure for the war. In the course of that meeting I did state to the audience that I would refuse to be conscripted under the circumstances and that I hoped, if I still had my moral courage, to be able to resist. I did not make any explanation of what was necessary to be done by the young men before they could be conscripted.

In that speech I did not make any explanation to them at all as to how this law could be repealed or how the Government could be prevented from acting or carrying this law into effect. I did not explain to them as to how they could resist conscription.

I do not recall the exact testimony of the policeman here in which he testified to what I said in regard to the registration law. I do not remember of saying: "Within my voice there are a good many young men within the age of conscription and that these young men will all be required to register under this law." I did not make any reference to registration at all. There was no question asked me on the subject of registration.

I do not remember in detail the testimony of Police Prosecutor Lind. I did not say in that speech: "Those who refuse to register, that the socialist party would defend and protect." I did not say that in substance. I did not say that the socialist party would not only defend but protect those who failed to register.

The Court: In this St. Louis resolution or program that 248 you say was the program that the socialist party adopted, it says: "We pledge ourselves (omitting some) to the support

of all mass movements in opposition to conscription." What do you understand is meant by a mass movement of your party?

The Witness: A mass movement is a mass demonstration to discuss, to educate, to take up and discuss in detail, any question or circulate petitions for the repealing. I have always determined the question of mass action in the ranks of the socialist movement meant mass demonstrations upon a certain proposition, or to advocate a certain question, such as the mass demonstrations we have had in the Public Square and throughout the city of Cleveland, urging the repeal of the conscription law; which was in harmony with the national declaration. My understanding is that the definition is mass demonstrations such as have been held in the city of Cleveland, where the people work together for the repealing of the law instead of working individually, that they hold large demonstrations together. That is what my interpretation is of mass action.

Redirect examination.

By Mr. Sharts:

Q. You were asked, Mr. Baker, on cross-examination, about some meeting over at Market Square along about June 10th?

The Court: And he testified that he did not remember having attended the meeting.

—. I did not make any different speech at those other meetings than that which I have repeated here. That is my set speech.

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1:30 p. m.—July 20, 1917.

Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf the defendant ALFRED WAGENKNECHT, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Alfred Wagenknecht. I am secretary of the socialist party of Ohio. I have held that position for seven months. I am 36 years of age. I was born in Germany and came to this country at about the age of a year and a half. My father has citizenship papers and I am a citizen because of his papers. He was naturalized during my minority.

I was present at a meeting on the Public Square on Sunday, May 27. Mr. Hayes and Mr. Ruthenberg also were the speakers. When I arrived at the Public Square, about 2:30, Mr. Hayes was already speaking. At that time the size of the crowd was about 3,000 or a little more.

250 Q. I wish you would narrate now to the jury your recollection of what Mr. Hayes said?

A. At that time—

Q. You are charged with having made a speech immediately

following Mr. Hayes in which you made certain remarks about Mr. Hayes' speech, and I wish you would tell the jury now what you understood by Mr. Hayes' speech and what it was you took exception to, if anything?

A. Mr. Hayes, when I came to the Square, was talking about the labor movement in New Zealand and Australia. He talked about that for a good half hour and finally, in ending his speech, he said that the socialists who would criticise or oppose the laws passed by the Government was a muddle-headed fool to do so, and in the beginning of my speech, I took exception to that. Mr. Hayes also stated repeatedly, reiterated, that the socialist party was a small and insignificant organization, and, of course, being a part of the organization, I took exception to that when I got upon the platform, because I am rather a booster and wanted to have the audience realize that we were a growing organization and fairly large. I took exception to what Mr. Hayes' said in his reference to criticism of the Government. I claimed in opening my address, that we had a right to criticise the government.

Q. Go right ahead and tell your understanding of Mr. Hayes' speech and what part of it you were taking exception to.

The Court: Probably you had better have him state what 251 Mr. Hayes said and what he said that he took exception to and then, if he wants to offer an explanation as to what he understood, let him do so.

Mr. Sharts: I think he stated what parts it was that he was referring to in Mr. Hayes' speech.

A. Yes, I was doing that. I will repeat, if it is necessary at this time, that Mr. Hayes indulged in a criticism of the socialist party organization and socialists in general, and for that reason, when I got upon the platform, I made an attempt to defend the socialist party, being an officer of that organization. I, therefore, told the audience that Mr. Hayes upon this occasion did not seem to represent the party organization, that Mr. Hayes had been away from the organization quite a while, had not been closely allied with the organization, had been more busy in union labor matters—I made that reference—and for that reason I thought Mr. Hayes did not express the opinions of our organization upon the platform that afternoon.

Q. Now, this remark that you said—about Mr. Hayes saying that the socialists who opposed and criticised the Government were muddle-headed fools—you said that you made some remark with reference to that?

A. I do not want to lay claim to the exact wording of that. I say that is what I understood he said in substance. He made a disparaging remark against socialists and he used some adjective in criticising them which belittled them—he either said "muddle-headed" or "simple-minded" or something like that. My answer to that was not a direct answer. It was simply an answer in general, namely, I got up there and told the audience

that Mr. Hayes was not speaking for the socialists this afternoon probably because he was too long away from the organization.

Q. Now, I wish you would repeat to the jury, as well as you can, the speech that you made as you got up on the stand after Mr. Hayes?

A. After I was through with my criticism of Mr. Hayes, I went on to indulge in the criticism of the fact that this country had entered the war. I dwelt on that for a little while. The few remarks I made, because they were not so conciliatory toward our government as the remarks of Mr. Hayes, brought forth a good deal of applause. The audience seemed rather to accept the remarks that I made, namely, the remarks which were against our government entering the war, with greater favor than the remarks that Mr. Hayes made, in that he sort of favored the war or did not oppose it as he should as a radical, as a socialist, and so my remarks were interspersed not only with a great deal of applause but with shouts. There was a great deal of shouting going on all the time, and I said these words, to the best of my recollection:

253 I said there were two things that any one can do at any time. You can either obey the laws that are passed or you can go to jail as a consequence for disobeying the laws. I said these things in explanation of my understanding of the right of a majority and a minority at any time and at any place. I am an organizer of the party and have been for years. I recognize the value of organization and its benefits. I know the rights of minorities in an organization. I know the rights of minorities in a government, and, in explaining to my audience the stand which we socialists take upon the war, and our stand upon this question of conscription, I simply wanted to tell them that there were majority and minority positions, namely, that there was a majority position, which was the position of the government at the time and which would keep them out of jail, and that there was a minority position that took the position against the war and would throw them into jail. I reiterated that remark two times because—in fact, I said it three times. The third time I said it was when I was arrested, because I intended to go back to that same matter to discuss it further and explain it further, but my arrest, of course, hindered me doing that.

Q. What was the further explanation that you were beginning?

A. I probably included that in my previous remarks, but I want to reiterate that my intention was to leave my audience with this notion, namely, that the registration law, the conscription law, which had been passed, was a law of the government, that I surmised that, because of the opposition to this war, there might 254 be certain violations of that law, and I wanted to leave my audience with the impression that those violations would entail jail sentences, and even before I was stopped making these remarks I said to my audience that jail sentences would be the result of violation of this law, not in so many words, but in effect. Now, I think that answers it, doesn't it?

Q. State whether or not you made any statements with regard to registration?

A. I mentioned the word "registration." I made certain references to registration, yes, sir.

Q. Do you remember just what language you used?

A. Well, I repeated that. I will repeat it again. I said there was one of two things you can do to my audience. There are one of two things you can do. You can either register and stay out of jail or you can refuse to register and go to jail. Of course, there was a qualification which I want to insert and which I inserted before and which I insert now, namely, the qualification that if you do not register and, as a result, go to jail you violate the law of the government. In other words, I was there telling them of the consequences of violation of this law and of the consequences of obeying the law. I was making an explanation to the audience.

Q. Have you given or did you in that speech give any advice on the subject of registration?

A. I never gave any advice upon the subject of registration to any one.

Q. Have you at any time given any one any aid in refusing to register?

A. I never did.

255 At the time I was speaking I observed a stenographer in the crowd. He stood about twenty feet away from me on my right, about.

Q. Explain to the jury his actions, as well as you recall them?

A. If the jury will remember, the typewritten transcript of my speech refers to my mentioning the stenographer. I have always paid particular attention in my meetings to the officials present and the prosecutors present and the stenographers and the federal agents, if I knew them. I knew they were present when they were there. Now, I kept my eyes constantly upon De Woody and the stenographer while I was speaking. I know that the stenographer labored under extreme difficulties in taking his speech, because the crowd was—not boisterous, but enthusiastic—did lots of shouting and lots of applauding, and it was true, as the stenographer himself testified, that at times he had to use Mr. De Woody in order to take his notes; he could not take them himself. Not only that, but I saw him ask Mr. De Woody several times—not once or twice but at least four times that I remember—"What did the speaker say?" I did not hear this distinctly, but I know he asked Mr. De Woody a question and then he stopped writing for two or three sentences before he could catch up again—before he continued his stenographic reports upon his sheet. Now the reason that I know that he asked him this question was because I can read lips fairly well at a distance, and I

saw the question formed that was propounded upon his lips:

256 "What did he say?" It is easy to recognize what a man says at most any distance when he says those few simple words.

Q. When you were in the midst of your speech, it has been testified that you were taken from the stand and placed under arrest. I wish you would tell the jury what occurred at that time?

A. I was taken down to the police station and stayed in an outer

office for a long time with some other people and several officers, and after the meeting had adjourned upon the Square, I guess, Mr. Lind and Mr. De Woody came in and took me into another room. I walked into another room and they stood in front of me, with my back turned towards the door and toward a corner in the room, and began asking me questions. I was not only asked questions by Chief of Police Rowe and probably by one or two officers in the room. Those questions at first pertained to my place of birth and my citizenship and what I had been doing in late years, and whether I had been to New York lately. They seemed to want to make an attempt to connect me with the German Government. Now, subsequently, they began to ask leading questions relative to my speech, and I got sort of huffed at that because I did not think they had a right to ask me those questions, and turning around I saw that the stenographer was taking everything that I was saying. I did not see him sitting there when I entered the room. The first question they asked me relative to what I had said at my meeting, I frankly told them that the case was not being tried in that room that day, and 257 all I wanted to know was what the charge was against me and wanted my bond set so that I could get out; I had another meeting to attend to.

Q. Were you asked any question there regarding the difference between your position and that of Mr. Hayes?

A. I was asked a question relative to that. In fact, I think they asked me two questions.

Q. Do you remember of any question put to you as follows: Mr. Lind saying to you: "This fellow, what's his name here, kind of upset the dope, didn't he?"

A. I remember that question, and I answered "Yes" to it, meaning, of course, that he criticised the party and upset the meeting.

Q. Do you remember any statement like this from you? "Well, he has been a little away from the party activities and he did not understand the party. He has taken the same stand that the labor unions generally have taken."

A. Yes, I answered him in that way.

Q. Do you remember a question like this put to you by Mr. Lind: "Well, he, in other words, does not believe that the rights of free speech goes as far as you do. Hayes evidently does not believe in advocating the violation of the law and that is where he differs from you?" Was such a question put to you?

A. Yes, a question that was put like that was put to me.

Q. Do you remember what your answer was?

A. I refused to answer.

Q. You refused to answer that question?

258 A. I refused to answer any questions with relation to the speech and my part in the meeting.

Q. You are positive on that subject?

A. I am very positive upon that subject.

Q. At the time that this questioning was being put to you, you say that there were a number of people in the room?

A. Yes, sir; not only were there a number of people in the room,

but questions were being fired at me from three sides, and this answer of "Yes" to that question may have been an answer to another question asked by Chief Rowe or asked by De Woody. I said "Yes" a thousand—not a thousand times—I said "Yes" a dozen times to various questions they asked, about my citizenship, about my place of birth, and where I had been lately, and how many years I had been in the party, and whether I was paid by the party or not, and all of those questions were asked me. They interspersed these questions with questions like these, attempting to make me admit that I had said something at my meeting that I did not say and never intended to say, and this answer of "Yes" undoubtedly was an answer to another question put to me.

I am affiliated with the national socialist party. I am familiar with the proclamation and war program of the socialist party. I was at the convention at which it was adopted. "Defendants' Exhibit No. 1" is the war program of the socialist party. The individual member of the party is always bound in some degree by the party declarations, but an individual in any organization has certain rights of criticising the organization, just the same as the organization itself takes the right to criticise those whom it opposes. As to the position of the socialist party in the matter of opposing by unlawful means any law of the United States, the socialist party is absolutely opposed to opposing anything by unlawful means, and differs in that respect from other organizations which we are sometimes mixed up with.

#### Cross-examination.

By Mr. Wertz:

When there are stenographers and officers in the audience I keep my eye on them because I want to see what they do and what they are about. I knew they were there in the meeting for the purpose of trying to get evidence against us, and I was very careful that I made no remarks that would lead them to make an arrest or get evidence against me.

When Mr. Farasey was talking to Mr. De Woody I very distinctly interpreted the words "What did he say?" by seeing his lips move. I do not recall what Mr. De Woody answered. He had his face away from me. What I want the jury to understand is that Mr. Farasey did not get all I said over there. His report is not correct in the main. I say it is full of error. I did not repeat my speech verbatim to the jury. I gave the jury to understand what I did say over there in substance. I did not believe on the 27th of May, when I made that speech, and do not believe now that it is the right thing to do for a socialist to refuse to register for conscription under the conscription act. I think that all socialists ought to go and register, after the law has been passed.

I was present at the meeting on the 13th of May in the socialist hall, on a Sunday afternoon. Mr. Ruthenberg was not the presiding officer. I was near the platform. I saw the resolution marked "Government's Exhibit No. 1" before the law was passed. I

did not see that on the 13th day of May. I did not hand it to the young soldier who testified here yesterday, who was a reporter for the "Cleveland Leader," on the afternoon of the 13th and say "That is the resolution we adopted." I do not remember of making a speech in that hall in favor of the adoption of that resolution. The young soldier was absolutely wrong in a good many points he tried to make. As to whether I or Mr. Ruthenberg handed it to him to put in his newspaper, I am absolutely sure I did not hand it to him. I don't know who handed it to him. I am absolutely sure I said nothing about that resolution. My residence is at 1291 Cook Avenue. "Government's Exhibit No. 2," containing "Government's Exhibit No. 1" was sent out by me as a sample of what local Cleveland was doing before the law was passed.

There was a bundle of these papers (Government's Exhibit No. 2) sent by me to East Palestine, Ohio, to a man by the name of A. A. Hennacy. I don't know whether the Government held them up or the postmaster refused to deliver them to Hennacy. I know that Hennacy did not get the literature. "Government's Exhibit No. 4" is a copy of the letter I sent to the postmaster at East Palestine.

261 I know who Hennacy is. I know he was convicted of opposing conscription and I know his appeal is pending.

262 Q. And I will ask you whether or not this is correct in this transcript: "Comrade Hayes has given you his version of this question of conscription. It happens, however, that our friend Hayes' version does not quite agree with the official action of the Socialist Party of the United States, and, not agreeing with the official action of the Socialist Party of the United States, we must say that this afternoon Max Hayes does not speak for the Socialist Party." Is that correct?

A. That is correct, in substance, when referring directly to the question of conscription.

Q. Referring to the question of conscription, then this is correct, is it, that Max Hayes does not represent the official action of the Socialist Party of the United States on the question of conscription? Now then, what was Max Hayes' attitude on the question of conscription?

A. Max Hayes' attitude upon the question of conscription was about the same as the American Federation of Labor took namely, that after the government has once spoken, no more should be said about the laws passed. That was my interpretation of Max Hayes' attitude as a state organizer.

Q. Is it not a fact that Max Hayes said they should go and register and comply with this law until Congress repealed that law?

A. He said that and other things about conscription.

Q. And isn't that the thing you were criticising Max Hayes for when you say that the Socialist Party has taken a definite and decided stand upon the matter of registration for conscription

263 and that Max Hayes does not represent the Socialist Party of the United States on that subject?

A. Are the words "registration for conscription *for conscription*" in that?

Q. Yes.

A. I did not say "registration for conscription."

Q. "The Socialist Party has taken a very definite and decided stand upon this matter of registration for conscription.

A. I did not say "registration for conscription."

Q. Then the stenographer put that in there and you never uttered it?

A. No, I don't remember of uttering it. I made it my particular aim to distinguish anything the audience might get upon these two words, namely, registration and conscription, and I distinguished between the two all through my speech.

Q. Is this correctly reported by the stenographer: "There are two things you can do under any circumstances, when it comes to obeying or disobeying the law, and these two things are these: You can either obey the law made by your masters and grovel in the dust and eat sand for the rest of your life, or you can at last stand up like men and say, 'The time has come when we, through organized power and strength, must say to the capitalists that they cannot any more curtail our rights and our freedom and our liberty.'?"?

264 A. Yes, but that was not in reference to conscription or registration. It was a general statement.

Q. Of course, during this period of change, during this period when the working class is ascending to power, many of us will have to take jail sentences because we were the pioneers, understand, in this movement for working class liberty, but when somebody has always had to take jail sentences who were pioneers in a movement for the liberty of any people, understand, and so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription."

A. Before that remark was made, I remember particularly telling the audience that governments had powers in certain instances in respect to the enforcement of laws, and then I said what you read to me in reference to the power that the government had in enforcing laws, and that those who violate the laws must take jail sentences.

Q. I ask you now, didn't you make that statement in reference to compliance or non-compliance with conscription and registration for conscription?

A. I made it a direct reference as applying to conscription, but nothing as applying to registration.

Q. If you agreed with the conscription act—were you ever informed that there was any jail sentence for refusing to be conscripted?

265 A. Knew of the jail sentence for refusing to be conscripted when the law was passed, when I read it in the newspapers.

Q. Don't you know as a matter of fact that there isn't any imprisonment for not complying with the draft, after you are drawn, except the fact that the soldiers come and take you away?

A. I know of nothing like that in the law. In fact, I don't believe it is true.

Q. Don't you know that the only sentence provided for in this so-

called conscription law is the sentence provided for non-registration under that law?

A. I think the direct contrary is the truth. I think there are other sentences provided in the law.

Q. There is one in regard to liquor and immoral women around the camp grounds, but outside of that do you know of any other?

A. You ask me that question?

Q. Yes.

A. I do not recall right now.

Q. Now, you read this law, didn't you?

A. I read it when it was passed, upon the day it was passed.

Q. You were thoroughly familiar with all of the provisions of it?

A. Fairly familiar, not thoroughly. I am no lawyer. I read it as one would read a newspaper article.

266 Q. What was the purpose of your reading that act?

A. As a matter of news, to inform myself.

Q. I will ask you whether or not you read it in order to see how close you could come to complying with that law and not comply with it and still not have the policeman pick you up?

A. Certainly not. I read it as a citizen would read it, in order not to violate the law.

Q. Do I understand you correct, that you said this: "And so we are willing today to take those jail sentences, and because we are willing—because we are willing to take those jail sentences, we say to you that you have full rights to do one of two things upon this matter of conscription."? Is that correct?

A. Is that continued from your recent utterance?

Q. Yes.

A. I want to say that I refuse to be placed in the wrong light before this jury. I am not going to answer "Yes" or "No" to certain extracts of my speech because one sentence conforms to another and there are a good many sentences I said which are not there, and I am not going to answer "Yes" or "No" to certain extracts which you may make in order to try to incriminate me.

Q. I will read it all then.

The Court: When the District Attorney puts to you a question and asks you if upon that occasion you made a statement 267 of that kind, it is your duty to answer the question. If you do not remember or if you are unable to answer it as put to you, it is your privilege to say so.

Q. I understand you to say that all that you said in your speech over there was against conscription, that it was not against the question of registration or not registering?

A. My speech over there was against the conscription law, in an attempt to raise sentiment against it so that we may have a chance to repeal it.

Q. And you advised no one there to refuse to register?

A. I certainly did not.

Q. You did not discuss the question of registration?

A. I did.

Q. How far did you discuss it?

A. I discussed, in explaining it, that if they did not register they would have to take jail sentences.

Q. And that is as far as you went?

A. That is as far as I went.

Q. I will read on now, continuing from where I read a few moments ago: "You can either register and run a chance of being drafted or you can refuse to register and go to jail. Applause and cries of "Jail, Jail." You have a right to go to jail, don't you know? You, brother, don't you know that you have a full right to go to jail if you want to? You have just as much right to refuse to register and go to jail as the government has a right to say that you shall register and go to murder. The question is, of course—  
268 you may applaud here this afternoon—but after a bit the question will be this: How many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register. Do you know that? Any young man within the age limits who does not grant the Congress of the United States the right to say that he shall go to war without first giving him a chance to say whether he wants to go or not, such a young man has his first opportunity to make a protest against conscription by refusing to register." Did you say that?

A. No, sir. The style of that is not at all the style that I would use in making a remark of that kind, of that nature.

The Court: Your answer is that you did not state that?

The Witness: I did not state that as he read it, no, sir: not under any circumstances did I say what he read.

Q. Did you say it in substance?

A. Not in meaning.

Q. Did you say it in substance?

A. Not in meaning, I answered.

Q. Then Mr. Farasey fixed up this typewritten record, did he?  
269 A. I claim he did not get a record when I was speaking on account of the great moving about of the audience.

Q. If he did not get it all, and you did not say that, then Farasey must have put this in here?

A. If he did not get it all, he fixed it up, what he did not get, later.

Q. You want the jury to understand that this stenographer who was on the witness stand here fixed up this record with something that you did not say in this speech over there on the Public Square?

A. I want the jury to understand Farasey himself testified that he took the notes with very great difficulty, and I know he did, and that is what I want the jury to understand.

Mr. Wertz: I would like to have an answer to my question.

The Witness: I think that is an answer. I want the jury to

understand, in other words, that Mr. Farasey could not take the notes in the position he was in and have those notes come before this court as accurate testimony of what I said.

Mr. Wertz: I would like to have an answer to the question:

The Court: I think the witness has answered that he did not say in substance, or at least in meaning, what Mr. Farasey has transcribed as his statement. I think he has answered the question.

Q. You also say that you did not say to Mr. Lind over 270 there in the jail that the way you differed from Hayes was because Hayes believed in complying with the law and you believed in violating the law?

A. I never answered "Yes" to that question. I have got too much sense to answer "Yes" to such a question before a prosecutor or before a Federal agent.

Q. Now, do you know what you were arrested for?

A. When?

Q. When they pulled you off of the block over there, what you were doing when they pulled you off?

A. I never knew what I was arrested for; I did not know until an hour or an hour and a half afterwards, when they placed a charge of disorderly conduct against me and being with a disorderly assemblage.

Q. Everything was peaceable up to the time of your arrest?

A. Except for the enthusiasm and jostling about of the audience.

Q. And at the time of your arrest there was a near riot and all excitement?

A. No, sir, just enthusiasm, applause and shouting.

Q. The crowd followed you?

A. That was after the arrest.

Q. These circulars similar to Government's Exhibit No. 2—this is marked "Government's Exhibit No. 27" which was used in another case—

271 Mr. Sharts: I want to interpose my objection to the introduction of this evidence.

Q. Is that the package you sent out from 1291 Cook Avenue, Lakewood, Ohio?

The Court: You object to that question being asked?

Mr. Sharts: I object to the introduction of any such evidence.

The Court: I will overrule the objection. As I understand it, the question is whether that is a package of circulars that he sent out?

Mr. Wertz: Yes.

Mr. Sharts: Enter our exception.

Q. Is that the one?

A. I cannot state whether that is the one or not.

Q. Come down and examine it.

A. An examination would not do me any good. I send out hundreds of packages a week over from the state office and I am sure I don't know whether this is mine or not.

The Court: To whom is that package addressed?

Mr. Wertz: The package is addressed to Ammon A. Hennacy.

The Court: Is the address in writing?

Mr. Wertz: Typewriting, "General Delivery, East Palestine, Ohio," and on the corner of that address is "The Socialist Party, 1291 Cook Avenue, Lakewood, Ohio."

Q. And you sent a letter to the postmaster—

272 The Court: He examined it, but I do not think he answered your question whether that package had been sent by him to Hennacy at that address.

The Witness: Packages like that and similar, probably that, were sent by me to Mr. Hennacy before the conscription law was passed.

Q. Do you remember when the last one of these packages was sent out?

A. I should judge the first half of May.

Q. The first half of May?

A. Yes.

Q. Now, referring again to Government's Exhibit No. 4, you say here: "Lakewood, Ohio, May 25, 1917. Postmaster, East Palestine, Ohio. Dear Sir: About a week ago two packages of printed matter were addressed to the East Palestine Post Office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened." Does that recall to your mind that that package might have been sent out after the 18th day of May, 1917?

A. Under no circumstances. The letter is dated the 25th, and I stated "about a week ago." It was probably ten days ago that I sent that package to Mr. Hennacy.

Mr. Sharts: Enter an exception to all these questions.

The Court: All right.

Q. Why are you so positive that you sent none out after the conscription law was passed?

273 A. Because I refused to fill orders for hundreds of thousands of those leaflets, after the conscription law was passed, as the State Secretary of the Socialist Party of Ohio.

Q. You sent them out right up to the time it was passed?

A. I did not send them out up to some days before the time it was passed.

Q. About a week before the 25th would make the 18th day of May, 1917, if your calculation is correct here, would it not?

A. I say "about a week." I do not say "a week." It may have been ten or twelve days.

Q. So it may have been a day or two more than a week, one way or the other?

A. It would not be less than a week, I am positive of that.

Q. Do you know as a matter of fact that that package did not reach the postmaster at East Palestine until the morning of the 22nd day of May?

A. I don't know when it reached there. By the looks of it, I would not be surprised if it never had reached there.

Q. Now, if you were present at that meeting of the Socialist Party out at the hall on the 13th, Sunday afternoon, when that resolution was adopted "And recommend to and urge all members of the Party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in 274 their refusal to become the victims of the ruling class," I will ask you if you had any plans or made any plans or any arrangements to render any of these parties financial or moral support in their refusal to register?

A. Since when? Since the law was passed?

Q. Yes.

A. Since they have been arrested?

Q. Yes.

A. The state organization has so far not paid out one cent for the support of ~~any~~ ybody who has refused to register.

Q. Of course, if the law did not pass, there would be no occasion for them to refuse to register, would there?

A. I suppose not.

Q. This letter says: "Lakewood, Ohio, May 25, 1917. Post Master, East Palestine, Ohio. Dear Sir: About a week ago two packages of printed matter were addressed to the East Palestine post office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened. I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio. If this is not done, and if by tracing we can find that you interfered with the delivery of this second package to the addressee, we shall immediately refer the case to our attorney and institute the proper proceedings. Yours respectfully, A. Wagenknecht, State Sec-275 retary. Sufficient postage for forwarding the package is enclosed." Is that a correct copy of your letter?

A. That is about correct, yes, sir.

Q. Now then, if, as you say, you sent none of this literature out after the conscription law was passed on the 18th day of May, 1917, why do you *to* say to this postmaster under date of May 25, 1917: "I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio?

A. Because Mr. Hennacy was sent a good deal of literature from our office, not only this kind but also books on socialism, and the entire reference in that letter may be to books on socialism rather than to this literature.

Q. Hennacy was distributing this literature, wasn't he?

A. And he was selling socialist books.

Q. And you sent him this literature to be distributed, didn't you?

A. Before the registration law was passed.

Q. And you wrote him on the 25th day of May "I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio," didn't you?

A. That does not prove it refers to this package.  
Q. I did not ask you that. Didn't you so write him?  
A. I wrote him that, yes, to the post master.

## 276 Redirect examination.

By Mr. Sharts:

As to my understanding at that meeting of May 13th, before the law was passed, about whether or not it was to be a compulsory registration, and being an officer of the party, I tried to make it my particular business to find out the penalties for not registering, because the socialists at headquarters and throughout the state were asking me for information. Up to the 13th of May I was laboring under the understanding that it would be a voluntary registration, because President Wilson himself claimed in one of his proclamations that this entire act of conscription was a voluntary act, and so I labored under the opinion that this was a voluntary registration. I thought you could register or could not register, just as you pleased. I sent a telegram to our socialist congressman Meyer London, asking him about whether or not a penalty was attached for failing to register. Undoubtedly there is a transcript of this telegram at the Western Union office which proves it. I did not receive an answer from him until I received a copy of the law, and I read of it in the newspapers, and at that time I was made aware of the fact that there was a penalty attached to the law and if you failed to register the penalty was that you would be put in jail for a year or less. From the time I discovered that there was a penalty attached for a refusal to register I have not sent out or had anything to do with the resolution which has been read to me here. (Referring to "Government Exhibit No. 1"). We had a conference at socialist headquarters in Cleveland of the executive committee together with some members of the state executive committee. We discussed the matter fully and the result of that conference was that no literature be distributed and sent out subsequent to the passage of this law, and this conference was held shortly before the law was passed. At that conference I think Tom Clifford, Mr. Ruthenberg, Mr. Checel and Mr. Bronstr. and probably two or three others. Mr. Clifford is ~~the~~ chairman and Mr. Ruthenberg is national committeeman, and these are the state officers who were present at that conference. As to whether I had a conference with Mr. Ruthenberg previous to the meeting on the Public Square on May 20th, I talked to him very often during the week. It was generally understood before we went to the meeting, and all meetings after the law was passed, that the tenor of all the speeches be within the law. As to the position of the socialist party with regard to obedience or disobedience to the law, the socialist party is a political organization which seeks to gain power through the ballot box and seeks to institute a different form of government by peaceful and lawful means. The letter which Mr. Wertz read which I sent to the postmaster is a form letter. Since the war has been

declared by this government the socialist party has had very much trouble with its mail, not only its second and third class mail but its first class mail. Letters have been opened. We do not get many

278 letters, and the proof of it is on the table here. There is copies of letters that are in the hands of the prosecution which went through first class mail and has been opened and brought into court. Now, this form letter has been sent out in very many instances to postmasters who have had the temerity to hold up our mail, and I sent this letter to the postmaster at East Palestine just as a matter of form, because I had heard, directly or indirectly, that some literature or some mail of some kind was held up by the East Palestine postmaster. At the time I sent that letter, I knew it had something to do with something I sent to Mr. Hennacy, but whether it was this package or whether it was a package of our socialist pamphlets and literature, which we sell at retail in the field, I do not know.

Q. Now in regard to your remark during your speech about those who failed to register would go to jail and those who did register would eat gravel or something that way, I wish you would explain to the jury in what sense you were conveying that statement to the audience?

A. That I would like to explain, yes. I did not use the word "registration," however. Even the transcript will show that I made no reference to registration. I meant that pioneers in a movement that was a radical movement and that sought to gain power always were subject to prosecution by those who were in power, that history proves that, and I tried to attempt to show the audience that when a movement like the socialist party movement attempted to instigate opposition to the war and attempted to repeal the conscription

279 law, the parties in power prosecuted the socialist party and threw some people in jail. In fact, we have had a good many socialists jailed for simply circulating the petitions to repeal the conscription law, thousands of which have been sent out by me throughout the state. We have had socialists arrested for circulating a petition to repeal the conscription law, and that is what I referred to, and that reference was made particularly to pioneers, pioneers in our movement, who were arrested. Now then, there is another remark in the transcript which I would like to explain, and that is the remark which reads: "Now, friends, you have the right to go to jail." All of my remarks were not secured at that time. That remark was made in a rather jocular manner. I was joking with the crowd. They were all laughing, and I was simply saying to them, as I would to a man next to me: "Of course, friend, you have a right to go to jail. If you feel like going to jail, go." It was not an inducement to him to go to jail. I was simply talking with him and saying that the jail awaits him if he attempts to break the law.

## Recross-examination.

By Mr. Wertz:

I am sure I was over there on this particular Sunday afternoon when the stenographer made this account of my speech.

As to whether, because I am pioneering that is the reason I keep my eye on the policeman, that may be one reason. We have been arrested for a good many things in our career which had 280 no basis in any fact or had no reason to find any cause for prosecution.

I do not know whether or not the Government opened my mail in order to get this letter which I wrote to the postmaster at East Palestine, Ohio, directing him to forward these circulars to Mr. Hennacy. I sent that letter to the postmaster. I have no proof that the government did not open anything in this case to get evidence on me. I have proof that they did in this package here. (Referring to "Government's Exhibit No. 27"). I account for our trouble in getting our literature through the United States mails through the officiousness of the small postmasters throughout the state. I have no direct evidence of any of our mail being held up here in the city of Cleveland, or any of these circulars. The local socialist paper was held up one or two weeks. As to my statement that all over the United States our publications were being held up, they were being held up for a week or two and then a committee visited Washington and the result has been that all of them are now again publishing and using the mails.

281 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf the defendant CHARLES E. RUTHENBERG, who, being first duly sworn, testified as follows:

## Direct examination.

By Mr. Sharts:

My name is Charles E. Ruthenberg. I am at present secretary of the socialist party of Cleveland. During the past three years I have been purchasing agent for the Printz-Biederman Company at Cleveland. Before that I was engaged as a salesman with the McCray Refrigerator Company, Cleveland. I am thirty-five years old. I was born in Cleveland and have lived all of my life in Cleveland. I have for the last eight and one-half years been secretary and organizer of the socialist party. I have three times been a candidate for mayor, a candidate for governor, a candidate for United States senator and its candidate for Congress in the 20th District.

I have not at any time aided and abetted anyone not to register. I was present at a meeting in socialist headquarters on May 13th. There was a resolution with regard to conscription passed at the meeting of May 13th, but it was not at the time of the passage of such resolution a legal meeting of the socialist party. The meeting adopted a resolution urging, recommending, persons not to register.

My understanding at the time this resolution was passed, with regard to the method of registration, was based upon the proclamation of President Wilson that the conscription would be a voluntary offering of the youth of the nation, of themselves, for the army. I was not familiar with any provision for a penalty for not registering. There was no action of the socialist party of Cleveland in reference to Exhibit No. 2 of the Government after the law was passed. The party absolutely took no action and was not concerned with matter in any way after the passage of the conscription law. There was a conference, with reference to that resolution, of the speakers preceding the meetings of May 20th and May 27th. After the conference I made a speech on May 20th on the Public Square, following Mr. Baker. At that meeting I made no reference to the position of the socialist party on the matter of registration. I mentioned the fact that there was to be a registration for conscription in my speech and then I discussed what conscription meant to the youth of the nation.

Mr. Wertz: When was this?

Mr. Sharts: This was on May 20th.

Mr. Wertz: There was no evidence offered that we made any charge against him on May 20th. This is confined to May 27th.

Mr. Sharts: Mr. Schue testified that he had a recollection, not by any means clear, it is true, that Mr. Ruthenberg followed Mr. Baker on May 20th and spoke.

The Court: Didn't he not also say that he did not listen 283 to Mr. Ruthenberg?

Mr. Sharts: But, if Your Honor please, it was part of the meeting of that day. It was a part of the program in which Mr. Baker took part, and I claimed that it would be competent, if on no other ground, because it was following out a fixed program of which Mr. Baker was only a part.

The Court: If my recollection is right, Mr. Schue testified, as I recall, that he left at the time Mr. Baker finished speaking and did not hear Mr. Ruthenberg's speech, Mr. Ruthenberg's speech being subsequent to that of Mr. Baker. I will hold that it is not competent, as to the 20th, you understand.

Mr. Sharts: Enter our exceptions.

Q. And did you hear Mr. Baker's speech on May 20th?

A. I did.

Q. I wish you would state to the jury, as well as you can, briefly, on what subject Mr. Baker spoke?

A. Mr. Baker began with an examination of the forces in present day society which brought about the concentration of wealth under the present industrial system. He shows that, as the result of the existing industrial system, wealth was gradually concentrated in the hands of a very small class of society, which became the dominant and ruling class in society. That this class made its profits through the exploitation of the workers in shops and 284 factories. That because of this exploitation of the working class the workers themselves were not able to buy back the

goods which they produced through their labor power, through their brain and muscle—

Q. I believe you can set forth the substance of his speech briefly.

A. That is what I was doing.

Q. So as to come to the portion about conscription.

A. And he continued along that line, showing the forces that brought war into the world, showing that war, as it existed in Europe, was the inevitable result of a system of producing wealth for profits. He continued with showing the forces in Europe which had brought about the war, and showed that those same forces, the interests of the capitalist class, making profits, were the cause of the present war in which this nation was involved. Then he proceeded to a discussion of the conscription law, showing that the Government of this country—

The Court: On the discussion of the conscription law, it probably would be desirable for you to state what he said as near as you can.

The Witness: I am doing that.

A. (Continuing:) He proceeded to the discussion of the conscription law, and said the following: That the Government of this country, through the influence of the ruling class, has forced 285 this nation into a war which has been found to be so un-

popular among the people that it has been unable to recruit the soldiers to fight that war without resorting to conscription. And so he said we are now in danger of being sent to the trenches of Europe against our will and wishes. We are in danger of being taken away from our homes and sent to do the work of the ruling class of this country, to fight for its profits, to kill human beings, because men desire to make money, whether we desire to go or not. And at that point he was asked by some one in the audience: "What shall we do about it?" A question to that effect, and he went to relate an interview which he had with a reporter at Akron which, in substance, was as follows: He said the reporter asked him why he was not wearing a flag in his coat lapel, and he replied and asked her whether she wore such a flag before the war was declared, and she said: "No." "Well," he answered, "I believe in Old Glory. I am proud of Old Glory," he said. "I honor it as every man should honor it, but I do not honor it because it stands now for war. I would rather wear it in time of peace, when it stands for helpfulness, stands for making the lives of human beings better, than to wear it only in time of war, when it stands for killing human beings." And the reporter asked him what he would do if after registration he was conscripted, and he replied that he hoped that

if he was taken against his will and wishes to be sent out of 286 this nation to kill other human beings of other countries, with whom he had no quarrel, toward whom there was no enmity in his heart, toward whom he would rather hold out the hand of comradeship and friendship, and work with them for a better world—if he was taken against his will, that he hoped he would have the courage at that time rather to be stood against a stone wall

and riddled with bullets than to do this work of the ruling class. That, in substance, was his speech.

Q. What reference, if any, was made by him to registration?

A. Only mentioning the fact in his speech that registration was to take place, and that the youths were to be conscripted for this work of killing human beings.

Q. And did you hear him advise any one with regard to registration?

A. I did not.

Q. I will ask you now if you were present at the meeting of May 27th?

A. I was.

Q. Do you recall the speakers who preceded you?

A. Yes.

Q. Do you remember who was the first one who spoke?

A. I arrived at the meeting during a speech being made by Max Hayes. Mr. Wagenknecht followed Max Hayes and I was the final speaker at the meeting.

Q. Do you recall the substance of Max Hayes' speech?

A. Yes. I can state it.

287 Q. At least that part of it with reference to which Mr. Wagenknecht spoke afterwards?

A. I can sum it up in a very few words. Mr. Hayes spoke at length in regard to the conditions under the capitalist system, through which the workers were robbed and exploited and compelled to suffer misery and hardships, and then proceeded to a discussion of the forces which brought about the war in Europe, and talked in regard to the present war, saying that it was part of this general force in society which brought these evil conditions into existence. He then dwelt upon what the workers of Australia had done, and showed that in Australia the government had been compelled to submit the conscription law to a vote of the people and that the Australian workers, who controlled the government through the Labor Party, had voted down the conscription law when they had a chance to vote upon it, and then he showed that the Government of the United States was not so democratic as Australia; that the people of this country were going to be compelled to serve in a war without having had a voice in deciding whether there should be such a conscription law on the statute book. He showed that the forces in control of this country were autocratic, because they placed such a law on the statute books against all the spirit of the history of this country, and in spite of the will and wishes of the people expressed at the last election. "But," he said, "It is the law. What can we do? We

288 have not had sense enough," he said, "to organize our power yet. We have not had sense enough to get together to take control of this government for ourselves, so we will have to obey the law while it is in existence," but he urged that we get together, that we organize, for the purpose of taking that law off of the statute books at the earliest possible moment.

Q. When Mr. Wagenknecht——

A. By the way, there is another point which I wish to add to my

statement of Mr. Hayes' speech, which is vital. I referred to it in my own speech. Mr. Hayes in his speech, in saying that the people had not had sense enough to organize, repeatedly referred to the Socialist Party as an insignificant minority. He referred to the Socialist Party as something weak, something which was not very strong, which had not thus far played a great part in present day society, in a spirit which grated upon my mind, and no doubt upon others in the audience.

Q. Now, when Mr. Hayes had finished, I believe Mr. Wagenknecht was the next one?

A. Yes, sir.

Q. Do you recall the incidents of Mr. Wagenknecht's speech and arrest?

A. Yes.

Q. I wish you would state the substance of Mr. Wagenknecht's speech.

289 A. Mr. Wagenknecht began with a reference to the speech of Mr. Hayes, referring to the fact that the spirit of his speech was a minimization of the power of the Socialist Party, of the position of the Socialist Party, and that he resented that, that Mr. Hayes had not been in touch with the Socialist Party of recent years, and that, therefore, he was not thoroughly familiar with the position and activities of the Socialist Party, which no doubt was the cause of his speaking in the slighting manner of the socialist movement at the present time. He then went into a discussion of the war, showing briefly that it was a capitalist war, and then turned to the conscription law, and pointed out that a conscription law had been passed and was on the statute books, and stated that this law provided that a man must either register or go to jail.

Q. Was it at that time he was arrested?

A. During the latter part of the remarks he was taken from the stand or platform.

Q. During the time Mr. Wagenknecht was speaking, did you hear him give any advice to anyone as to whether he should register or not?

A. I did not.

Q. You have heard the stenographic notes of the young gentleman who testified, Farasey? As those notes were read, I will ask you whether or not that impressed you as a correct rendering of the speech of Mr. Wagenknecht?

290 A. It did not so impress me, and I know of my personal knowledge that the stenographer asked people in the audience, "What did he say?"

Q. You observed the stenographer while Mr. Wagenknecht was speaking?

A. Yes, sir.

Q. Did you notice where he stood?

A. He stood at the right of the speaker, about twenty feet away from the Stone platform.

Q. Did you notice whether he was in company with others or alone?

A. There were people around him. I don't know who they were.

Q. You say that you have personal knowledge of the fact that he was asking others?

A. I have seen him repeatedly during these meetings turn to a person next to him and ask—at least, the entire action indicated that he asked one question repeatedly. When a man is writing and turns and speaks and asks a question, the indication was that he asked: "What did he say?" and he got some sort of reply.

Q. After Mr. Waggenknecht's arrest, I believe, you took the stand?

A. I did.

Q. Who was it that introduced you?

A. Mr. Hitchcock.

Q. And you then made a speech?

291 A. I did.

Q. I wish now you would state to the jury—by the way, that speech, it has been testified by Mr. Farasey, he took down your speech and you heard those notes read in court?

A. Yes.

Q. I will ask you whether or not that impressed you as a correct rendering of your speech?

A. It was not. I can state one thing in regard to that speech that I know was absolutely incorrect. He put in my mouth, in connection with an utterance, saying that I said that we would have to do the "base, dirty work of the ruling class." Now, that word "dirty" in that sense is one that I would never use, that when he read it — set my teeth on edge, and made a shudder go through my entire body, because it was so repulsive to me in that connection. It is a word that I would never use in any speech I make because I do not use that kind of language.

Q. I will ask you now, Mr. Ruthenberg, to give to the jury as well as you can recall it, a correct restatement of your speech.

A. The speech which I have made, of course, was one which I had worked out mentally, and the various propositions contained in it were something I am thoroughly familiar with, so that I believe, while I cannot state each word exactly, I can state that speech in its

292 general meaning as it was delivered on that day. I began it this way: Comrades and friends: We have here this afternoon witnessed an incident such as has happened in Russia on many occasions. No doubt, under the reign of the Czar there have been many times when attempts have been made to stop the telling of the truth. There have been many occasions when those who are the servants of the ruling class in society have tried to prevent those who were fighting for the liberties of the people from uttering the things that they desired to state, and this afternoon we have here in this United States witnessed a thing which we have so often condemned in Russia, the land of darkness and dread things. But, in spite of this thing having taken place, I will proceed with my speech just as I proposed to make it to you before this thing happened. I am going to present to you my ideas, my thoughts, in regard to the present war and the things which the people of this country face at the present time. I am not going to appeal to your emotions, I am go-

ing to submit the facts for your consideration. I do not believe in appealing to your sentiments. I want you to consider the truth as men and women, thinking men and women, who wish to make this world a better place to live in for all of mankind.

A few days ago there was a call issued by certain workers for a conference in Stockholm, to be held for the purpose of endeavoring to find a common basis for ending this horrible war, for ending 293 this thing which has cost the lives of millions of human beings, and through which other millions have been crippled and maimed and smashed beyond recognition as human beings—a conference was called by certain people to try to bring an end to this war. I am adverturing to this thing now because it shows us how much truth there is in the statement that this nation is fighting a war for democracy. This conference was called by the workers of Belgium, the workers of Denmark, the workers of Norway and Sweden, to hold an international Socialist Conference, to find a basis for terms of peace and end this bloodshed and murder of human beings. All of these nations—the Belgian workers, the workers of France and of Germany and of Austria and Russia and England, all of the countries of Europe—yes, even Turkey and Bulgaria—are sending their delegates to this conference, to see if they cannot end this war, and this awful murder of men and women, but there is one country which will not be represented at that conference. That is a country which is claiming that it is carrying on a fight for democracy. That is these United States, which has refused passports to a conference which has as its purpose to bring peace into the world. That is the best answer to the question: whether we are fighting a war for democracy or not.

My friends and comrades, this is not a war for democracy. This is not a war for freedom. It is not a war for the liberties of 294 mankind. It is a war to secure the investments and the profits of the ruling class of this country, and I am going to show that to you. I am going to give you the facts so that you can judge for yourselves. Prior to the election of last November, from the date of the St. Louis convention of the Democratic Party to the November election, the spokesmen of this Democratic Party went up and *and* down this country, from the Atlantic to the Pacific, from the Canadian border to the Gulf of Mexico, and they appealed to us to support and re-elect the present administration, to put them back into office, and what did they tell us was the reason why we should re-elect the President and Congress? What did they offer as their chief ground for re-election to their places in the government of this country? You know as well as I know that the chief appeal of the Democratic Party during this campaign was the cry: "He kept us out of war." He kept us out of this horrible thing in Europe, this chasm, this shambles, in which all that is good in our civilization is disappearing, in which all the kindness and humanity and the spirit of brotherhood which has grown up in the world is being wiped out of existence. The Democratic Party asked us to re-elect its candidates for President and its Congress because we knew of this horrible thing, because we knew of this bloodshed, this crippling and maiming of human beings, and because we had turned back from it aghast,

295 and cried out in horror at this awful thing that was happening in Europe, and they said: "We kept you out of this war, so put us back into office." And what do they say now? • They say now that they kept us out of a war for democracy and freedom. My friends, judge for yourselves. Judge yourselves whether what they said before election is the truth about this matter or what they say now is the truth about this matter. I am here to say to you that what they said before is the truth about the matter, and that the only reason we are in this war now is because it is to the interests of the ruling class, the capitalistic class, this country to have us in this war, and I am going to show it to you. I am going to prove it to you. I am going to submit facts to you to prove this assertion.

In January of this year, according to the reports of this ruling class itself, there was a trade balance of five billion dollars in favor of the American capitalist class. In other words, they had exported to Europe, they had sent out of this country of the wealth which we produced, which the sweat and labor of the people of this country brought into existence. They had sent out of this nation five billion dollars more than had come back into this country, and for this they

296 had received gold, they had received stocks and bonds, they had received other things in exchange, and in the Spring of this year this enormous traffic—and I say to you that never in the history of the world has there been a class which deserves more condemnation, which deserves more criticism, than the American capitalist class which saw in this struggle in Europe, in this killing and maiming and murdering, this bloodshed, this destruction, this wrecking of all that is good and beautiful—which saw in this thing only an opportunity for profit—I say to you that never in the world has there been a class which deserves more condemnation than the American capitalist class, which desired nothing more than to make profits out of the murder of their fellow human beings, and, when they saw their profits in danger through the fact that the German submarine menace became more serious, they found it necessary to use their power over the government of this country to hurl this nation into that war, not to fight for democracy, not to fight for freedom, but to fight for their profits, to fight for the loans which Morgan & Company and their fellow capitalists had made to the Allies. They were ready and willing to send the youth of this nation into this horrible nightmare of murder, to kill and to be killed, in order that their profits might be saved. That, my friends, is the cause of this war.

And they have done more than that. They have gone farther than that in this thing. For many years—yes, decades of time—it 297 has been the spirit of this nation that compulsory military service was only possible in an autoeratic country. We have looked across the waters and said that the people of Germany cannot be free because they are conscripted and forced to fight the battles of the ruling class. We have said the people of France and of Italy and of Russia cannot be a free nation as this country is a free nation, because they can be compelled to shoulder a gun and murder their fellow human beings, and today the government which has appealed

to us because it kept us out of war, from which we have heard many beautiful platitudes about democracy, has put this most reactionary and autocratic law, the conscription law on the books of this country.

My friends, I want to give you a picture of what conscription means.

The Court: Will it disturb you if we suspend at this point?

The Witness: It will not.

The Court: You will resume at the point where you have stopped. We will take a recess.

(Recess.)

The Court: You may resume your testimony at the point where you left off.

A. (Continuing:) I want to give you this picture by illustrating it through a story which has come to us from Europe, from 298 one of the countries which is now involved in this war. A young man coming from a humble home had gone to this war, gone out into the struggle, into the bloodshed, into all that makes up this horrible thing we call war, and he had done what the newspapers said was a heroic deed.

A. (Continuing:) This young man, who had done what was called a heroic deed, was returning from the trenches to his home city on a furlough.

The Court: Of course, you will understand that you are not expected to make a new or different speech, but to repeat, as exactly as you can, the language you used on that occasion. You understand that?

The Witness: I am making, as I recollect, the speech I made on May 27th.

A. (Continuing:) This young man, returning to his home from the trenches, after having done what was called by the newspapers a heroic deed, namely, having killed in a struggle, single handed, three of his enemies, was to be welcomed at home by a crowd at the depot, by music and by all of the other things that go to make up the sham patriotism of murder and warfare. And the people waited for him at the station. The train came in and they looked for him to welcome him with glad acclaim, but he was not to be 299 found. He did not come from this train. He was not seen to leave it. And the audience, the people that assembled there, did not find him to welcome him as they expected. But he had himself left the train at a station on the outskirts and by the back alleys reached his home, where he found his mother—his mother to whom he went first, and she, too, was about to honor him, about to state her gladness for his heroic deeds, state how much she admired his courage, and when she started to do that the young man laid his head down in her lap and put his face on his hands and began to weep and said, "Mother, I cannot think of it. I cannot think of this horrible thing I have done. I cannot think of the look of that young man's face,—a young man just as I, a young man who might have been my comrade and friend, a young man who might have been a happiness and joy to me—when I put that

bayonet in him and took his life from him. Do not talk to me about the glory of the deed. Do not talk to me about the bravery of the deed. It will be the curse of my life for the rest of my days that I murdered a fellow, human being thus." That is what conscription means to the youth of this nation. That is what it means to them to be taken from their homes without their consent and sent out to the trenches to murder and be murdered for the profits of 300 the ruling class of this country. That is what the government of this nation has done in order to put this statute on these law books of this country—a statute which, in my opinion, is entirely contrary to the fundamental law of this country, the constitution of the United States.

If law means anything, if words mean anything, when the constitution says that there shall be no involuntary servitude in this nation except as a punishment for crime, it forbids specifically taking a man against his will and making him fight and murder his fellow human beings. Yes, one of the foremost statesmen in the history of this country, Daniel Webster, as long ago as 1814, when the Congress of the United States was considering the passage of a conscription law, arose in the House of Representatives of this land and denounced it as contrary to the constitution of this country, saying, "Where do you find it written in this document, this right of the government to take the young men of the country out of their homes and send them forth in any war which the wickedness or folly of the government may declare? Where has this power lain hidden which now for the first time comes forth in this baleful aspect?"

And thus I say to you, who are gathered here, those of you 301 who believe in humanity, who believe in brotherhood, who believe in the beautiful and good things of life rather than in bloodshed and murder, that we must use our strength and our power to wipe out of existence, to put out of office, this government, which, contrary to the wishes of the people of this country, has put this law on the statute books. And I say to you further—I say to you here, now, believing as I do, that war is a horrible thing, believing with all my heart and soul that to go forth in war is to murder your fellow human beings, believing, as I do, that this war is a war in the interests of the ruling class only, believing, as I do, that this war has come into existence because the class in power and in control of the government of this country desires to continue to make profits out of the murder of human beings, and to protect those profits which they have invested in loans to one side in this war—I say to you, as I have said before from the rostrum on this Public Square, that I refuse to become the victim of the ruling class. I said to you before I knew that the ages specified in this law would not include me—I said to you then that I would refuse to be conscripted, that I would refuse to shoot my fellow human beings, and I say to you now that there is no power on the face of the earth that could make me shoulder a gun and go forth in the world to murder another fellow human being of mine. There is no power in the 302 government of this country that can say to me, with the conscientious objections which I have to this war and to the work of the

war, that I shall murder another human being, and, rather than commit that act of murder, than to be forced into that act of murder, I will permit the government to riddle me with its bullets and die in this position than to murder another human being.

My friends and comrades, when I speak to you thus, I am speaking to you in all seriousness. I am speaking to you with that spirit which has been shown by those ten thousand men in England who are today lying in English jails because they refused to go to war, because they refused to permit a government to conscript them. I am speaking to you as Karl Leibknecht spoke in the German nation, as he spoke in the Parliament of that country, when he denounced the war as a war of the ruling class and stated his unalterable opposition to that war. And I say to you that, if you are inspired with this ideal, which is the hope of the future, if you are inspired with this desire to build a better world, then you must stand with the Socialists. You must fight with the Socialists against war. You must use all of your strength and power to bring the day when

we can wipe this law—which thus violates the dearest right 303 of personal liberty, which would cause a man to kill another human being—until the day comes that we can wipe this law off of the statute books by a people rising in their might, taking control of their own affairs and putting out of office a government which has betrayed them into this thing.

My friends, they have said of us Socialists who stand here before you that we are traitors, that we are street-corner traitors. I say to you that it is not the men and women who have dedicated their lives to upholding this principle of humanity, not the men and women who desired nothing but to bring brotherhood and comradeship and fraternity into the world, not the men and women who opposed this war before the election time and who oppose it now, who are traitors to the American people—but I say to you that it is the men who asked for their election, the men who pleaded through you to support them, because they kept you out of war, and then hurled you into the war, who are the traitors, if there are any traitors to the American people in this country at the present time.

We must organize our forces to meet the situation. We must organize our power to alter this situation. There is no hope for the people, of again bringing peace and humanity and the spirit 304 of brotherhood and the spirit of comradeship and the good and beautiful things into the world and ending all of this

horror and misery and suffering and bloodshed, unless the people themselves organize their power and make themselves articulate. We can, by meetings of this character, by coming together here, five thousand people this afternoon, and protesting against this conscription law—we can tell the government of this country that we do not want this law and we demand that Congress repeal this law, and if this Congress of this country will not repeal this law—because we meet in mass meetings all over this country—for just as we are meeting here today, men and women are meeting in other cities, and just as we are protesting against war, so men

and women are protesting the world over—if we cannot make this government understand that the people did not want war, that they did not want conscription, then we must await the day until we can go to the election booths again and sweep that government out of power and elect men to power who will represent the wishes of the people and change this law and repeal this law, this traitorous act of the ruling class of this country, which has taken from the people of this nation the dearest rights of personal liberty, even to the extent of making them do murder.

And we of the Socialist Party are carrying on this fight.

305 We are here to carry on this fight. We are here to organize the people of this country for this struggle. We are working toward this end, that out of the chaos, out of the bloodshed, out of the horror of this war at the present time there may come a new society, a new world, a new organization of the people, which will end the cause of war by ending the private ownership of the industry which brings war into existence, which, in place of appealing to us in the shape of patriotism to do murder, will appeal to us to be friendly and comradely and brotherly toward all other nations. For, my friends, there is no hatred in the hearts of the people of this country against the people of Germany. There is no hatred in the hearts of the English workers against the people of Germany, there is no hatred in the hearts of the French people against the people of Austria, or of the Russians against the People of Turkey. They are not trying to kill each other, they are not trying to murder each other, because they hate each other. It is a delusion which the lying prostituted press of this country has tried to put into our minds in order to trick and deceive us. The people of those countries would, if they were allowed to do their will, reach out to each other the hand of brotherhood and 306 fraternity. It is only because the commercial interests of the ruling class are at stake that they are thrown at each other's throats to murder each other.

We are here to fight to the end, to end this condition in the world, to build up this new society, to build up a new spirit in the world, to end war, to end murder, to end suffering, to end the destruction of millions of lives and billions of wealth and bring into existence this comradeship of the future, this brotherhood which must inspire the hearts and minds of all men, in which we will have fraternity and equality, and in which for the first time there will be reserved to the people those inalienable rights of life, liberty and happiness which the Declaration of Independence says is the fundamental right of every human being. We ask you to stand with us. We ask you to work with us to achieve this beautiful goal of Socialism, the brotherhood of man, for today, as never before, rings out in the world the cry of the poet of the social revolution:

“Come, shoulder to shoulder  
E'er the world grows older.  
The cause spreads over land and sea.  
Now the earth shaketh and fear awaketh,  
And joy at last for thee and mee.”

“Joy at last for me and thee”—for the working class, and for the first time there will come into the world this new spirit 307 of love, of equality, fraternity, happiness and peace.

The Court: That is as you remember it?

The Witness: That is as I remember the speech I made at that particular time.

Q. I will ask you if, during this meeting, there was any reference made by you to registering?

A. As I stated in this resume, I referred to it only that, “Soon the youths of this nation would be asked to register for conscription.”

Q. State whether or not you gave any advice to any one on the subject of registering?

A. I did not.

Mr. Wertz: I object.

The Court: The objection will be sustained to that question in that form.

Q. State whether or not at this meeting and during this speech that you were making, or possibly any subsequent statements at that meeting—

The Court: No, at that meeting and in the course of that speech is the limit of the inquiry aga'inst him, I think.

Mr. Sharts: I think if Your Honor will remember the notes that were offered here of the stenographer, there was a reference to handing out cards, was there not?

The Court: That was in the course of his speech, I believe, that he was handing out pledge cards, and there was something said about that.

Q. Have you made any reference in this speech that you 308 have here delivered to that subject?

A. I have not.

Q. I wish you would state what remark, if any, you made at that time?

A. At the time I was asking for support for the Socialist Party I handed out a card applications for membership in the Socialist Party.

Q. Have you any of those cards with you?

A. I have not.

Q. Do they contain on them any reference to registration?

A. They do not.

Q. Upon the close of your remarks, what next occurred?

A. I left the rostrum and proceeded to walk toward the police station for the purpose of visiting and finding out what the charge was against Mr. Wagenknecht.

Q. Had you at any time during your meeting observed the young man who was indicted with you on the charge of failing to register?

A. I have never seen him in all my life until today.

309 There was a conference of speakers held prior to both the meetings on the 20th and the 27th. Mr. Wagenknecht and myself were present at the conference on the 20th and at the conference on the 27th. Mr. Baker came to the City of Cleveland a number of days prior to the meeting of May 20th. I do not recall the exact date. I do not recall whether or not Mr. Baker was in the city of Cleveland at the meeting on May 13th. I do not recall any conference or meeting with Mr. Baker at which this resolution which was introduced here was discussed. There was no reference made at any of the meetings that Mr. Baker held and at which I was present as to any such resolution.

I attended the convention which drafted the proclamation and war program of the Socialist Party which has been introduced in evidence as "Defendants' Exhibit No. 1" and was a member of the committee which wrote it. I personally wrote clause 2 of the program, dealing with the question of conscription.

Q. Did the committee of which you were a member at the convention at any time consider the matter of registration?

A. I did not.

Mr. Wertz: I object.

The Court: The objection will be sustained to that.

Mr. Sharts: If your Honor please, I think you have already ruled with regard to intent, that it is proper for us to introduce circumstances that would tend to show what the intent of the speaker was in any remarks.

310 The Court: I have ruled that he may say what his intent and motive was, but what you are inquiring about is entirely too remote and irrelevant to that inquiry, as I view it.

Mr. Sharts: If Your Honor please, here is the position I would like to make clear that I am taking in this matter. The intent with which he uses the word "registration" in his speech is more or less connected with his position as a speaker for the Socialist Party and as a national committeeman of the Socialist Party, and in connection with the program and proclamation of the Socialist Party of which he was a part author.

The Court: I think it is entirely too remote here for you to undertake to prove the discussion of the platform committee of a convention held at some other time and some place else.

Mr. Sharts: Enter our exceptions.

Cross-examination.

By Mr. Wertz:

I understand that the state office of the Socialist Party of Ohio is located at 1291 Cook Avenue, Lakewood, Ohio.

I was not the presiding officer of the meeting on the 13th of May. I do not recollect who was the presiding officer. I was not on the platform. As to whether I handed this resolution (referring to Government's Exhibit No. 1) or a copy of this resolution to the young newspaper man, I do not remember of handing any-

311 thing to any newspaper man at that meeting. If I had handed it to him, I would remember of doing so. I have no recollection of handing it to him. I spoke for twenty minutes against the adoption of a resolution to instruct members of the party not to register. I was present at the meeting when this resolution was adopted. I do not know of any authorization that was needed to give Mr. Wagenknecht the power to send out such literature. The State Secretary has certain powers in connection with the propaganda, which he can carry as he deems well and fit. The meeting on the 13th of May was called for the purpose of nominating candidates for political office. It was an illegal meeting insofar as it took any action in regards to conscription. So far as that particular leaflet is concerned (referring to Government's Exhibit No. 2) I did not see it until today in the court room. I did not say that the only part of that circular which I ever heard of before was the part containing the resolution which was adopted on the 13th of May. I have seen the Constitution of the United States before. I have seen the speech of Daniel Webster before. It was published in one of our socialist newspapers and I read it there, so I have seen other parts of that circular. I did not see all of that circular as it stands until today.

Q. Did you ever see this circular here marked "Government's Exhibit No. 3?"

A. Yes, I have; I believe so. If you will let me examine it, I will make sure.

312 Mr. Sharts: When was that introduced?

Mr. Wertz: It was not introduced. It was identified.

Q. When did you see that before?

Mr. Sharts: I object, if Your Honor please, on the several grounds. First of all, there has been no identification of that leaflet with the activities of these men. There has been no identification of that leaflet in connection with Mr. Schue.

The Court: I think he may be asked when he saw it before. The objection is overruled.

Mr. Sharts: Enter an exception for the defendants.

I saw that circular pinned to the wall in the hall of the building where the socialist headquarters are located and took it down and put it in the wastebasket. On Sunday, May 13th, at the time of the meeting that I have been inquired of. The socialists, those in the socialist movement, had not been seriously discussing the position of refusing to register at that time. It was first brought up at the meeting. I knew at the time that this resolution was under discussion over at the socialist hall that it provided: "That we recommend to and urge all members of the party and workers generally that they refuse to register for conscription." In answer to the question as to whether I knew this part was in there: "And we pledge to them our financial and moral support in their refusal to become the victims of the ruling class," I heard it read. I do not know of

any specific reason for pledging to these men who refused to register financial support. I know a socialist called Clare. He is a 313 member of our organization. He is the custodian and literature agent at socialist headquarters. He is there at times and out at meetings more often. I certainly did not issue any instructions to Clare in regard to furnishing financial assistance to men arrested, who refused to register. I did not instruct him to furnish any other kind of assistance.

314 Q. Did you say in that speech on the Public Square: "We need only to look at the newspapers and their hysterical appeals to the people to register for conscription. They are trying everything under the sun. They are doing all in their power through the Billy Sunday form of revivalism to induce you to register for conscription. They are afraid." Do you recall having said that, in substance?

A. I recall having said that in relation to the attempt to raise an army by the voluntary method and the failure of it, and then went on, as I stated in my speech, to show that the government had found it impossible, because the people were opposed to war, to raise such an army and thus were trying to compel the people to fight.

The Court: Put your question over again and ask him whether he said that.

(To the witness:) You will then give a direct answer of "Yes" or "No."

(Question repeated.)

A. I recall having said that in relation to recruiting and not—

Q. No. Did you say that in substance?

A. I did not say it in relation to registration.

Q. I did not ask you that. I asked you if you said that in substance in your speech.

A. No.

Q. Then the stenographer hasn't it correctly reported in 315 this transcript?

A. I saw the stenographer numerous times asking for information.

Q. I did not ask that, I asked you whether or not the stenographer had a correct report of what you said.

A. If he has put those words in my mouth, the report is not correct.

Q. Is this correct?—did you say this: "They"—speaking of the government—"are afraid that the working class of this community on registration day enact their own referendum in regard to this law by refusing to register. (Loud applause)"?

A. I did not. I referred to a referendum in connection with the failure of the government to permit the people to vote on the conscription law.

Q. The stenographer then has got you correctly reported on that subject?

A. Evidently not.

Q. Did the stenographer report you correctly on this: "What is to be the position of the working class of this nation in regard to war and registration for conscription? Are we in this country, having been bludgeoned—no other word describes it—having been forced into the war against our will, against our wishes and in violation of the mandate on which the President and Congress was elected—are we to meekly submit and lie down and permit the ruling class to do its evil, base, dirty work?"?

A. I did not make that statement as appears there.

Q. Did you make that statement in substance?

313 A. You are asking me to say that the stenographer has got it correct now.

Q. Did you make it in substance?

A. I did not use the word "registration" in that statement, nor the word "dirty," which I never would use in that connection.

Q. It is correct except that you did not use the word "registration"?

A. I did not say anything about registration.

Q. Did you make this statement in your speech: "And, further, we of the Socialist Party have taken a certain definite position in regard to conscription?"

A. I very likely did, referring to the National organization's position.

Q. "We have taken the position, this position, that the 13th Amendment to the Constitution of the United States forbids involuntary servitude, forbids the Congress of this country to enact any laws which are intended to force submission of the people to voluntary servitude. And we take the position that when Congress enacts a law which is a violation of the fundamental law of the nation and the ruling class enforces that law through the courts which it controls, when the only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law." Did you make that statement in your speech in substance?

A. The statement as it appears without the statement which followed would do me an injustice.

317 The Court: The question is did you make that statement.

The Witness: I qualified the statement by stating the way the people should act with reference to that law.

Q. Did you make that statement?

A. With a qualification.

Q. Then the stenographer has you correctly reported: "The only way that the people can show that they do not intend to have their freedom and their rights trampled under foot is by refusing to submit to that law."—That much of it is correct?

A. I went on to say that the way to refuse to submit is to organize the strength of the people to wipe the law from the statute book, as I stated in my speech.

Q. Is this the qualification which you made to that statement: "And so the Socialist Party *by* the city of Cleveland by resolution has gone on record as urging and recommending to every worker

who is inspired by a belief in humanity, to every worker who believes that wholesale murder is just as wrong as the murder of an individual—as urging and recommending to every worker who does not desire to take a gun and shoot down his fellow beings, no matter whether they are being called Germans or Austrians or Russians or English—whatever their nationality may be—we have said to those workers by official action of the Socialist Party that we urge and recommend that they refuse to be registered for conscription?"

A. I did not say that in reference to registration. I said it  
318 in reference to conscription.

Q. "To refuse to be registered for conscription?"

A. To refuse to be conscripted.

Q. Explain to the court and jury how you can conscript these men for the army until they are registered?

A. I will gladly explain, for the purpose of the court and jury, that I further stated, that rather than be conscripted, rather than be compelled to fight in this war, I would be stood against a wall and riddled with bullets. I might register and still not submit when I was conscripted. That was my position.

Q. Will you explain to the jury how in your mind it was possible to conscript the socialists or the young men of this country without first registering them under this law?

Mr. Sharts: I object.

The Court: I think that is a legitimate —.

Mr. Sharts: If Your Honor please, the point is this; He is asking him to explain how they could conscript them without registering. He has not urged their conscription.

The Court: I will overrule your objection, and on this ground: The witness has undertaken, every time that the word "registration" has appeared in any of the transcript of what he said upon that occasion, to say that he did not use the word "registration," but it was "conscription," undertaking to draw in his mind some distinction between opposing registration for conscription and opposing conscription. Now, as bearing upon his intent, and what he  
319 meant by his acts and words, I consider the District Attorney's question competent.

Mr. Sharts: Enter the exception of the defendants.

A. I would gladly state, in reply to the question, that this difference existed in my mind: A man might submit to registration, he might voluntarily go and register his name as a man between the ages, go through that formality, and later, if he happened to be one of the victims who was selected to go and shoot his fellow human beings, he might well, as tens of thousands of men in England have done, refuse to be conscripted and to murder his fellow human beings. That is my position.

Q. I did not ask you for your position. I ask you how they could conscript these men without registration? By what process in your mind would it be possible to do that?

A. I think it would be entirely possible. I do not believe it is

my business here today to tell the government how it might have done this thing differently.

Q. How did you understand that these men could be conscripted without being registered first?

A. You will remember that I did not say to them that they should refuse to register but said that they should refuse to be conscripted, which carried with it the fact that they might well submit to registration, but later they might claim exemption, they might raise all of the objection, and if they were still selected to fight in the army and they had these conscientious objections, which I stated I had, they could then refuse to do this work for the government.

320 Q. That is all you ever had in mind?

A. That is my position.

The Court: And did not your statement also carry with it that they might refuse to register?

The Witness: Not necessarily.

Mr. Sharts: I object. I wish to enter the exception of the defendants to the inquiry by the court.

Q. Did you follow that statement that I asked you about last with: "I say to you here this afternoon, as I said at the first meeting which I addressed on the Public Square after war was declared—at the first meeting, at a time when the ages in the conscription law had not been fixed—I said to you then, when I personally was in danger or conscription, that if I came between the ages provided for in that law that I would refuse to register for conscription." Did you say that?

A. I stated in my speech what I did say, which was that I would refuse to be conscripted.

Q. Did you say that?

A. I did not say that.

Q. Did you continue immediately after that: "My friends, I am ready to say more: That if this law is amended, if later, after the workers who are to be drafted have been sent to the trenches of Europe and have been mowed down by the Million against the socialists on the battle fields of Europe, if, after the first million or two of the flower of the humanity of this country has become 321 the victims of the ruling class in their insensate greed and desire to make profits, if they have become pulsating masses of human flesh, and then Congress amends this law to draft men of greater ages into the army, and those ages include mine, then I shall refuse to become the victim of the ruling class and be conscripted"?

A. I certainly did not state what appears there.

Q. The stenographer manufactured that out of his own mind?

A. I can show you one positive statement that he did manufacture in that sentence.

Q. Is the substance of that correct?

A. It is not.

Q. Did you continue with this statement: "Further, that if the time comes that I am asked to go into the army, if my name were registered by force and the government drafted me, believing, as I

do, in humanity and being opposed to killing my fellow human beings—opposed to the wholesale murder which is going on in Europe, then I say that the ruling class and government of this nation will find that they will have to stand me against a stone wall before they can bring me into the army to fight their battles"?

A. I did not make the statement as appears there. I made it as I stated it in my speech, which is quite different.

Q. Do you recall using the words: "If my name were registered by force"?

A. I certainly did not use that expression.

Q. Is what you have testified here, in answer to a question 322 by Mr. Sharts, in which you reproduced your speech—is that all you said over there at the Public Square on that subject?

A. It is what I recollect saying on the Public Square, and it is very vivid in my mind.

Q. Now, continuing after what I read to you before, do you remember that you made this statement: "I think I have made our position in regard to conscription, and in regard to the war, as clear as it can be made." Do you recall that?

A. I surely did, our position in regard to the war and in regard to conscription.

Q. And did you continue: "I tell you as frankly and as openly as I possibly can that we socialists do not intend to do this work of murder"?

A. That grows out of my statement that I would refuse to be conscripted.

Q. "I would be saying little to you if I left you with only this message, if I only told you that we socialists did not intend to register for conscription." Did you say that?

A. I did not.

Q. And did you continue: "If I only told you that we socialists did not intend to register for conscription, if I told you only we socialists are opposed to the war, then my message would not be complete"?

A. I did not say what you have just quoted.

Q. Then the stenographer who took that down made a mistake in what you said?

A. I am quite aware that he made many errors in taking it down, from the way he took it.

323 Mr. Sharts: Was this circular offered in evidence? (Referring to exhibit marked "Government's Exhibit No. 3.")

The Court: No. It has not been offered and has not been identified in any such way as, in the opinion of the court, would make it competent if it were offered.

Redirect examination.

By Mr. Sharts:

Q. The circular that Mr. Wertz showed you you stated you saw pinned on the wall of the socialist headquarters and you took it down and put it in the wastebasket?

A. I did.

Q. What was your purpose in doing that?

A. I was not in sympathy with what appeared on that circular.

Mr. Sharts: Now, if Your Honor please, I would like to have that introduced.

The Court: Do you object to its being introduced?

Mr. Wertz: No.

The Court: It may be introduced.

(The said exhibit, marked "Government's Exhibit No. 3" was also marked "Defendant's Exhibit No. 2" and is hereto attached and made part hereof.)

(The said exhibit was thereupon read in evidence to the jury by counsel for the defendant.)

Q. This is the circular that you are not in sympathy with?

A. I took it down and put it in the wastebasket.

Q. State why you are not in sympathy with the statement in that circular?

A. Because it urges young men not to register.

324 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf W. J. BAUKNET who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is W. J. Bauknet. I am in the banking business. I am assistant treasurer of the Pearl Street Savings & Trust Company, of Cleveland, Ohio. I am acquainted with Mr. Wagenknecht, one of the defendants in this case. I have known him from three to four years. My acquaintance has been through advertising, probably two or three times a week. I have met him frequently during those three or four years.

Q. I wish you would state to the jury your opinion as to Mr. Wagenknecht's character?

A. Mr. Wagenknecht's character is good. I don't know of any bad habits he has. He has never expressed himself in any other way only through business, and I have had business dealings through advertising business—a little association that he was secretary of—for the last three years.

Cross-examination.

By Mr. Wertz:

My association with Mr. Wagenknecht has come in a business way, through advertising. He was secretary of a small paper that was published in our location, the south end. I gave him advertising for the paper he represented. It was not his paper. The paper is called the "Bulletin," an advertising medium. It is not a socialist paper. The

325 purpose of the advertising is general business advertising of the merchants along West 25th Street. He used to call for the copy for the ad I gave him for that paper. He would call about once a week on copy, and talk over advertising from time to time on things that we used to have, like picnics and carnivals along the street. That was the only way I knew him. These transactions took place about once a week. From those meetings I formed my judgment as to his character. I have met him outside of meeting there.

326 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf HARRY DECKER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Harry Decker. I am now in the manufacturing line. I am now and have been a resident of Cleveland for 53 years. I am acquainted with Mr. Wagenknecht, one of the defendants. I have known him, I should judge, about four years. He was during that time in my employ and I saw him practically every day. I have formed an opinion regarding his character.

Q. Now, state to the jury what that opinion is as to his character?  
A. I would not know anything, gentlemen, to reflect on his character. I must say that I never had a man in my employ who was more loyal and more agreeable and seemed to be more conscientious than he was. He took care of his work, performed his duties that were assigned to him, till the time that I quit business. Had I remained in business, he would still have been with me, I suppose.

Cross-examination.

By Mr. Wertz:

I was in the dry-goods business on the West Side.

327 Thereupon the defendants, further to maintain the issues on their part, called as a witness in their behalf MAYO FESLER, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is Mayo Fesler. I am secretary of the Civic League. I am acquainted with Mr. Ruthenberg. I think the first time I met Mr. Ruthenberg was about 1912, during the arrangements for the Constitutional Convention of Ohio. Mr. Ruthenberg at that time was a candidate for the Convention on the Socialist ticket. Since that time I have not met him frequently. I have met him at numerous times, that is, in times of political campaigns. I have not have a very broad opportunity of forming an opinion. My organization

passes judgment upon candidates for public office. And this particular time that I have mentioned, the socialists had candidates for the Constitutional Convention. We did not pass judgment upon the candidates at that time. We simply made a statement as to their training, and so on, which the candidates themselves gave us. After that date, whenever Mr. Ruthenberg was a candidate—I think he was two or three times after that—the socialist party as a party declined to furnish my organization with any information, so that, all that we did in connection with those candidates was to make a statement of their age, training, occupation, and so on, with no opinion on their qualifications for a particular office, or no opinion as to their character. Now then, my knowledge of Mr. Ruthenberg, my acquaintance with him, has been only as I have 328 come in contact with him at those times, and then for two years, when I was secretary of the City Club, when he was on the platform before the City Club, I think on two or three occasions to address us from the socialist point of view.

Q. Have you formed an opinion of his character from those opportunities to converse with him and meet him?

A. Yes, I think I have.

Q. I wish you would state to the jury what your opinion is as to his character.

A. I should like to preface it with this statement: that my acquaintance with him would not warrant me in passing judgment on him or in taking up with my executive board an expression of judgment as to his qualifications for office, but my acquaintance with him has led me to feel that Mr. Ruthenberg is an honest sincere gentleman, but misguided in his political and social beliefs

329 Thereupon the defendants, further to maintain the issue upon their part, called as a witness in their behalf A. D. BEAUCLAIRE, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sharts:

My name is A. De Beauclaire. I am manager for a New York Publishing house. My office address is 416 American Trust Building. My residence is 7217 Melrose Avenue, Cleveland. I have lived in the city of Cleveland 25 years. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have known Mr. Ruthenberg constantly 18 or 20 years as an employe. During the time he was in my employ I saw him every day. I feel that I had ample opportunity to form a correct opinion of his character.

Q. I wish you would state to the jury what, in your opinion, his character is?

A. Absolutely truthful and reliable gentleman.

Cross-examination.

By Mr. Wertz:

Mr. Ruthenberg was in my employ from 1897 to 1907. He has not been in my employ since 1907.

## Redirect examination.

By Mr. Sharts:

Since he left my employ I have had opportunities to meet him occasionally.

Q. What opportunities for forming an opinion as to his character since then have you had in the way of meeting with him?

A. None particularly since he left my employ. I have 330 only met him occasionally, as we meet people we know on the streets, and chatted with him, and he has not been in my employ, but, so far as my knowledge of him goes, I have learned nothing to the contrary of my previous knowledge of him.

331 Thereupon the defendants, further to maintain the issues upon their part, called as a witness in their behalf WILLIAM B. FISH, who, being first duly sworn, testified as follows:

## Direct examination.

By Mr. Sharts:

My name is William B. Fish. My occupation is manufacturer of cloaks, in connection with the Printz-Biederman Company of Cleveland. I have resided continuously in Cleveland for about 25 years. I am acquainted with Mr. Ruthenberg, one of the defendants in this case. I have known him as an employe of ours approximately three years. While he was with us my opportunities for contact with him were frequent, daily. During that time I have had an opportunity to form an opinion as to his character. I should consider that he had a reputable character. He is what I would call a good man.

## Cross-examination.

By Mr. Wertz:

We let Mr. Ruthenberg go about a month or more ago, possibly six or eight weeks ago. The reason we let him go is because we felt that the views he held upon matters pertaining to subjects that are particularly subject to test during the war crisis were not such that we could afford to harbor him under our roof. The views that I had in mind when I said that we could not harbor him under our roof were views that called in question the authority of this Government to do the things that it is trying to do now. I cannot say that he had pronounced views upon that subject except in a general way. I understood those to be his views.

(Thereupon the defendants rested.)

332 Thereupon the Government, further to maintain the issues on its part, called as a witness in its behalf, in rebuttal GEORGE WILKINSON, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wertz:

My name is George Wilkinson. I am postmaster in East Palestine, Ohio. The package marked "Government's Exhibit No. 27" arrived at East Palestine, I think, on the 22nd of May, in the morning.

Cross-examination.

By Mr. Sharts:

The pencil writing on Government's Exhibit No. 27 is not my writing. One of the clerks in the postoffice at East Palestine, Ohio wrote that. (Referring to pencil writing reading: "Received torn at East Palestine postoffice.") The paper was torn a little bit when that arrived. I think I saw this bundle (Referring to Government's Exhibit No. 27). It was a bundle like that which arrived at East Palestine postoffice and was sent from there to the District Attorney at Columbus, Ohio. I don't know who sent that package, but, if it is the package they have reference to, it was sent from Cleveland, Ohio. I did not see him send it.

Mr. Wertz: If we have not already done so, I want to introduce in evidence all of these Government exhibits Nos. 1, 2, 3, 4 and No. 27.

Mr. Sharts: What is No. 27?

Mr. Wertz: The package circulars.

Mr. Sharts: I want to enter an objection to the introduction of the package, Government's Exhibit No. 27. I think it is entirely irrelevant in this case.

The Court: The question of the competency of Government's Exhibit No. 27 depends upon the identification of that as something circulated by Mr. Wagenknecht.

Mr. Wertz: Mr. Wagenknecht, himself, as I recall it, said that he sent out hundreds of packages just like this one and sent some to this particular man Hennacy, too.

The Court: It will be admitted.

Mr. Sharts: Enter the exception of the defendants.

The Court: This completes the testimony in this case.

Thereupon both parties rested.

The above and foregoing, together with the exhibits hereto attached and made a part hereof, being Government's Exhibits 1, 2, 3, and 4, and Defendants' Exhibits Nos. 1 and 2 is all the evidence offered and received on the trial of the above entitled case.

Adjournment to July 21, 1917; 9:00 a. m.

The Court: Gentlemen of the Jury, on yesterday afternoon I permitted two items of evidence to be introduced to you without a

the time instructing you as to the extent to which it is to be received and considered by you, which I deem it my duty to charge you with respect to. One is what is known as the Government's Exhibit No. 4, a copy of a letter dated May 25, 1917, purporting to have been written by the defendant Wagenknecht and the other is Government's Exhibit No. 27, a package purporting to have been sent through the mails. I am instructing you that those two items of evidence are to be received and weighed by you only as against the defendant Wagenknecht, and not as against the other two defendants here, and are to be received and weighed against him only for the purpose of enabling you to pass upon the intent with which his acts were done and speeches made on the 27th day of May, 1917.

Mr. Wertz: If the Court please, would not the jury also be entitled to consider this evidence by showing the probabilities if they found that these had been mailed after the 15th of May, or the letter written after the 18th of May, 1917—

The Court: I will not say anything further than I have said on that subject.

Mr. Sharts: If the Court please, there are four brief charges  
335 that we request the Court to give to the jury before argument.

The Court: I will receive your request, and, to the extent that I think they are sound law, I will give them in my general charge to the jury, but I will not give any of them before argument. That is not the practice of this Court.

(Exception by defendants.)

The said requests to charge are as follows:

If you find that defendant Wagenknecht aided and abetted, induced, counseled and commanded Alphons J. Schue not to register, but that defendants Ruthenberg and Baker did not in any way assist the said Schue not to register, then you may return a verdict of "Guilty" against Wagenknecht and a verdict of "Not Guilty" against Ruthenberg and Baker.

If you find that Wagenknecht and Baker aided and abetted Schue not to register but that Ruthenberg did not in any way aid and abet the said Schue not to register, you will return a verdict of "Guilty" against Wagenknecht and Baker, and a verdict of "Not Guilty" against Ruthenberg.

Gentlemen of the Jury, I charge you that you shall take the testimony of Alphons J. Schue with the greatest caution, and I charge you that it is extremely dangerous to convict any man on the uncorroborated testimony of an accomplice.

336 You must be satisfied beyond a reasonable doubt that all the three defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker did so aid, abet, counsel, command, induce and procure the said Alphons J. Schue not to register before you can return a verdict of "Guilty" against any one of them or all of them and if you feel that you cannot satisfy yourselves beyond such reasonable doubt, you will return a verdict of "Not Guilty."

You will disregard any testimony that has been given here as

tending to prove that these defendants aided Schue not to register except that testimony which tends clearly to show that this aiding, abetting, counseling, commanding, procuring and inducing was done or said in the presence and hearing of the said Alphons J. Schue, and did so, in fact, induce him directly not to register, and unless you find these to be the facts, you will return a verdict of "Not Guilty."

Thereupon, after argument to the jury by counsel for the respective parties, the Court charged the jury as follows:

337 The Court: It is my intention, Mr. Sharts, to give the defendants the benefit of all the special requests that you have presented.

Gentlemen of the jury, in the important public duty which you are called upon, in connection with myself, to perform, there is, I may say, a division of labor. It is my duty only to advise you correctly as I hope to do, about the law which applies in this case. It is your duty, accepting that law, to apply it to the facts. It is also your duty to determine from the evidence introduced before you what the facts in this case are, and whether or not, upon those facts, under the law, the defendants, all of them, one of them, or two of them are guilty or not, as charged in the indictment. I have no purpose therefore, to intimate to you in the course of my charge my individual opinion as to what the facts are nor as to the guilt or innocence of any one or all of these defendants, and, if any of you should draw an inference from anything that I have said or may say as to what my personal opinion is in that respect, I ask you to disregard it.

The three defendants here are on trial for having aided, abetted, counseled, induced and procured one Alphons J. Schue to violate the law of the United States. That is the charge against the three defendants, and, as I have said—the evidence justifying it—you may find any one or more or all of them guilty, and any one or more of all of them not guilty.

338 The law of the United States which they are alleged to have caused or procured Schue to violate is an Act passed the 18th of May, 1917, entitled: "An Act to Increase Temporarily the Military Establishment of the United States." It has been known and referred to among some persons as the Selective Service Law, among others as the Draft Law; it has been referred to by still others as the Conscription Law.

Gentlemen of the jury, I say to you that that law is a law of the United States, that it is a valid, constitutional law, and that it is binding upon all of the citizens of the United States and all other persons within, and under the jurisdiction of the laws of, the United States. You will, therefore, disregard any suggestion or intimation that has been made to you, either in the testimony or in argument, or elsewhere, of any question about the constitutionality or the validity of that law or about its binding force and the duty resting upon each and every person within the jurisdiction of the United States to obey it.

That law, among other things, provides, that it shall be the duty of all male persons, between the ages of twenty-one and thirty, both inclusive, to register themselves in accordance with the proclamation of the President of the United States. The Proclamation was issued fixing the 5th of June as the time, and the voting booths of each precinct as the place, for all persons subject to its provisions to comply therewith. It thereupon became and was the duty of Alhpons

339 J. Schue to register, and his failure to register in accordance with its provisions, he being a male citizen within the prescribed ages, constitutes an offense, a violation of that law.

Now, the charge against the defendants here, as I have stated, is that they aided, abetted, counseled, commanded and induced him to violate that law, and that they have thereby made themselves, if you find from the evidence beyond a reasonable doubt that they did so, guilty as principals in the same degree of the same offense that Mr. Schue was guilty of.

The elements, therefore, of the crime which is charged against these defendants, and which it will be necessary for you to find from the evidence that they are guilty of beyond a reasonable doubt, are:

First. The failure of Alphons J. Schue to register in accordance with the provisions of that law, and the further fact that he was a person subject to the provisions of that law and required to register.

Second. Did the defendants here, any one or more of them or all of them, aid, abet, counsel, command and induce him so to unlawfully and wilfully refuse to register, and thereby cause and procure him to commit that crime?

Third. Did Mr. Schue wilfully fail and refuse to register as a result and consequence of the counsel, commands, influence, or advice received by him from these defendants or either of them?

Those are the elements of the crime and the fundamental 340 facts you must find from this evidence beyond a reasonable doubt are present here in this case before the defendants or any one of them can be found guilty.

Now, gentlemen of the jury, it is necessary that you find from the evidence beyond a reasonable doubt all of these things, but I am going to charge you more particularly as to the last two elements of the crime. It is necessary, as I say, that you should find beyond a reasonable doubt that these defendants, some one or more of them, or all that you shall find guilty, if you find anybody guilty, did wilfully advise, aid, counsel, abet or induce Schue to commit that crime. It is not necessary that this aiding, this abetting, this counseling, this inducing, should have been in any particular manner. It is not necessary that you should find that these defendants or any of them knew that he was present there listening to what is alleged here against them. It is, however, necessary that you should find beyond a reasonable doubt that what was said by these defendants and each of them was said with the intent, wilfully and knowingly, to cause persons within the hearing of their voices to wilfully fail to register and comply with the provisions of this law.

In that connection, and as bearing upon that part of it, I wish to announce some other principles of law to you. It is said that every

person under the jurisdiction of the laws of the United States is entitled to freedom of opinion, and that is true, and, being entitled to freedom — opinion, he is entitled to freedom in expressing his 341 opinions, and that is true. It is his privilege, and it is proper for every person within the jurisdiction of our laws, within certain limits, to oppose the adoption of laws. It is the privilege and right of everyone to urge the repeal of laws. It is the privilege and right of every one to express his opinion with respect to the wisdom or unwisdom of laws that have been passed, and to criticise and comment upon the conduct of public officials. All of that is true.

There is, however, this limit in the law upon those rights and privileges. No one has the right, under the guise or pretext of criticising the existence of a law or the wisdom of a law, or of advocating or urging its repeal, to urge, induce, or incite anybody to violate a valid existing law of the United States. Whenever he transgresses that limit and his words and acts, however they may be guised or phrased, are intended by him for the purpose, and will have the necessary and direct result, of causing or inducing somebody to violate such a law, then he is guilty also with the person who has acted upon the aiding, abetting, advice and counsel that have been so given to him. It is not permitted to anyone under the guise of freedom of political opinion or freedom of speech, or freedom in the enjoyment of his religious convictions, to violate, or intentionally cause others to violate, the laws of the land.

342 A Mormon cannot, under the guise of its being his religion, live in polygamy within the limits of the United States. One who does not believe in the institution of the Sabbath, or Sunday, as do a majority of the people in the United States believe in it, and religiously disbelieves in it, is not thereby exempted from obedience to the Sunday observance laws, and is not exempted from responsibility if he incites, advises, causes, or procures others to violate them.

So, in this case, gentlemen of the jury, the right and freedom of opinion on the part of these defendants, any of them or all of them—their political or other beliefs as to the validity of this law or its constitutionality, or as to its wisdom or unwisdom, their right to urge its repeal and to express their opinion with respect to it—does not protect them, under the law, if you should find from the evidence beyond a reasonable doubt what they, all of them or any of them, wilfully and intentionally urged, counseled, advised or procured Schue to violate that law.

Now, gentlemen of the jury, as I have said, it is not necessary that that aiding, abetting, commanding, counseling and inducing should be given in any particular way. It is only necessary that you should find from the evidence beyond a reasonable doubt that such was the wilful intent of these defendants or either of them, if the evidence here shows that they were guilty of the conduct alleged against them.

You must, of course, find that.

343 While you must find the three elements of this crime beyond reasonable doubt, it is not necessary that you should find that they used the words when they gave the advice, that "you

shall not" or "you must not" or "you ought not" to register. It is sufficient if you find that it was their wilful intent to produce that result in the minds of their hearers; and that the language used by them, as a whole, was calculated to produce and to cause necessarily that result in the mind of anyone that listened to it who was within the age limit, and, therefore, called upon to observe the law.

Now, I have said in this connection, gentlemen of the jury, that I am intending only to state to you the law. That is my part of this trial, and your part is to find the facts. I have said, however, that you must find each and all of these elements of the crime, including the further element that Schue was thereby caused and induced to commit the violation of law, beyond a reasonable doubt and that is the law. The humanity of our law is such that every person put upon trial charged with the commission of a crime is presumed to be innocent until he is proven guilty by the evidence produced before you beyond a reasonable doubt. I do not know that I can make clearer to you what is meant by the expression "reasonable doubt." Learned judges have said that efforts to make the expression clearer

than the words "reasonable doubt" make it are likely to be 344 misleading and confusing. I shall, therefore, not charge you

further on that, than to repeat that the evidence must show each and all of the defendants guilty beyond a reasonable doubt of the crime alleged against them, and must show that as to all of the elements of the crime, before you can render a verdict against them.

As part of your duty it will be necessary for you to consider the credibility of the witnesses who have testified here before you. You are to weigh the testimony and to judge of the credibility of the witnesses. It is for you to determine, and not for me to determine, the weight and credibility of the witnesses. It has been said, and I say to you, that in passing upon the credibility of witnesses you are entitled to take into consideration their manner of testifying, their interest in this cause or the result of this cause, their apparent bias and prejudice, if any, or their freedom from bias and prejudice, if any, the inherent probability or improbability of the statements made by the different witnesses, and from all of these and such other considerations and facts as are present in the case, applying thereto your fund of common sense and human experience, say from this testimony what the truth is.

In that connection, however, I deem it incumbent upon me to say this further to you. Alphons Schue is indicted as an accomplice, as a particeps criminis or a party to the crime alleged here against the defendants, and it is a rule of law for the weighing of the tes-

timony of accomplices that it is to be looked upon with great 345 suspicion, and that ordinarily it is the duty of the Court—

and I am now performing that duty—to advise you that it is unsafe to convict upon the uncorroborated testimony of an accomplice. It is also the law, gentlemen of the jury, that it is within your province to render a verdict of guilty upon the uncorroborated testimony of the accomplice, if you find therefrom that the defendant is guilty beyond a reasonable doubt. I say this also to you,

that it is not necessary to the application of that rule that the corroboration should be as to all or the entire testimony of the accomplice. It is sufficient to satisfy the rule to which I have adverted and as to which I have just advised you if he be corroborated by other testimony in any one or more of the material elements or particulars of this evidence relating to some one or more of the material elements of the crime. It is not necessary, in other words, that his entire story and testimony should be corroborated.

So I say to you, gentlemen of the jury, that it is for you to weigh the testimony. The credibility of these witnesses is for you. You are to bear in mind my caution as to the testimony of an accomplice. You will bear in mind what I have said as to your right even though that testimony is not corroborated. You will bear in mind what I have said if you find it to be corroborated. It is for you to say whether or not you find from this evidence beyond a reasonable doubt that any one or more or all of these defendants are guilty or not guilty.

You understand that I am not undertaking to tell you what you shall find, but if the evidence, under the instructions I have given you, warrants it, you may find all of the defendants guilty or not guilty, or you may find the defendant Wagenknecht guilty and the other two defendants not guilty. You may find also Baker and Wagenknecht guilty and you may find the defendant Ruthenberg not guilty, just as you may find all of them guilty, and you may change or reverse the order and find as to the guilt or innocence of any one or more of them as you feel justified under the evidence in doing.

I have stated to you that the crime charged against the defendants is that they aided, abetted, commanded, counseled and induced Schue to violate the law. It is necessary that you should find this beyond a reasonable doubt, from what the evidence shows to have taken place in the presence of Schue and from what these persons so communicated to Schue, that he was thereby caused and procured to commit this crime. Evidence of what these defendants did, any one or all of them did, outside of the presence of Schue and not communicated by them to Schue, is not to be weighed by you in determining whether or not the defendants, any one or more of them, is guilty of a crime. The evidence that I have permitted to go to you on that subject, as I have already charged you, is limited to the respect stated at the time it was introduced, and for 347 the purpose of, in one or two instances, affecting the credibility of the testimony.

Now, gentlemen of the jury, you will be furnished with two different forms of verdict which are so phrased with blanks therein that it will be possible to return your verdict or verdicts in the form in which I have indicated, that is, finding all guilty or not guilty, one or more guilty or not guilty, and so forth. When you retire to your room, you will select your foreman and when you have agreed upon your verdict you will advise the bailiff: and you will be brought into court and your verdict will be received by me.

The Court: Is there anything that either counsel wish to request the Court to give in charge which I have not done?

Mr. Sharts: No, if your Honor please.

Mr. Kavanagh: I have a request to make on reasonable doubt. I have the form that is adopted by this Court and has been followed by the Supreme Court, and I request it at this time.

The Court: If counsel for the defendants joins in that further request I will give it. If counsel for defendants does not, I will not amplify the charge on that subject.

Mr. Sharts: We are quite satisfied to have it read.

348 The Court: Counsel for the defendants joins in the request that I define to you further reasonable doubt. What is a reasonable doubt? A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the mind of a juror. You will be justified, and are required, to consider a reasonable doubt as existing if material facts, without which guilt cannot be established, may be fairly reconciled with innocence. In human affairs *absolutely* certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious, ingenious or artificial doubt is of no avail. You will look then to all the evidence, and if that satisfies you of the defendants' guilt, you will say so. If you are not wholly satisfied and find only that there are strong probabilities of guilt, your only safe course is to acquit.

Mr. Sharts, it has been the rule in this court that the exceptions to the charge have to be taken before the jury retires.

Mr. Sharts: We have no exceptions to enter.

349 Thereupon the jury retired and in due time returned into court with its verdict, which said verdict was a verdict finding the defendants guilty as charged in the indictment, as appears of record herein.

Thereafter, and within three days from the rendering of said verdict the defendants duly filed their written motion for a new trial, as appears of record herein, and also duly filed their written motion in arrest of judgment, as appears of record herein.

Thereafter, this matter coming on to be heard, upon the said motion for a new trial and affidavits filed in support thereof, the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Thereupon the matter coming on to be heard upon the motion in arrest of judgment filed by the defendants herein, the court, upon consideration thereof, overruled the same; to which action of the court the defendants thereupon duly excepted.

Thereupon the court pronounced sentence and entered judgment against the defendants herein; to which action of the court the defendants thereupon duly excepted.

Now come the defendants and presents to the court this, their bill

of exceptions in narrative form, and, upon consideration thereof, the court finds that the foregoing bill of exceptions, together with the exhibits hereto attached and made part hereof, is a true, correct and complete bill of exceptions, and the same is hereby allowed and signed this 21 day of August, 1917.

D. C. WESTENHAVER,  
*District Judge.*

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

Filed Jul. 21, 1917, at — o'clock — M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

Gov. Ex. 1. F. H. R.

(Here follow fac-simile leaflets marked pages 351 and 352.)

# Down With Conscription

**The 13th Amendment to the Constitution of the United States reads:**

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

## CONSCRIPTION IS THE WORST FORM OF INVOLUNTARY SERVITUDE.

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in a war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesmen, said this of conscription in the Congress of this country, Dec. 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents . . . compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power been hidden which now for the first time comes forth, with a tremendous and ~~hateful~~ <sup>hateful</sup> effect, to ~~hand~~ <sup>hand</sup> down and destroy the dearest right of personal liberty?"

Every man who is determined to uphold the "dear ~~July 21 1917~~ <sup>July 21 1917</sup> of personal liberty," every man who refuses to become a victim of the war, declared by the government to protect the millions loaned the Allies <sup>by the capitalists</sup> of this country, should

**REFUSE TO REGISTER FOR CONSCRIPTION**

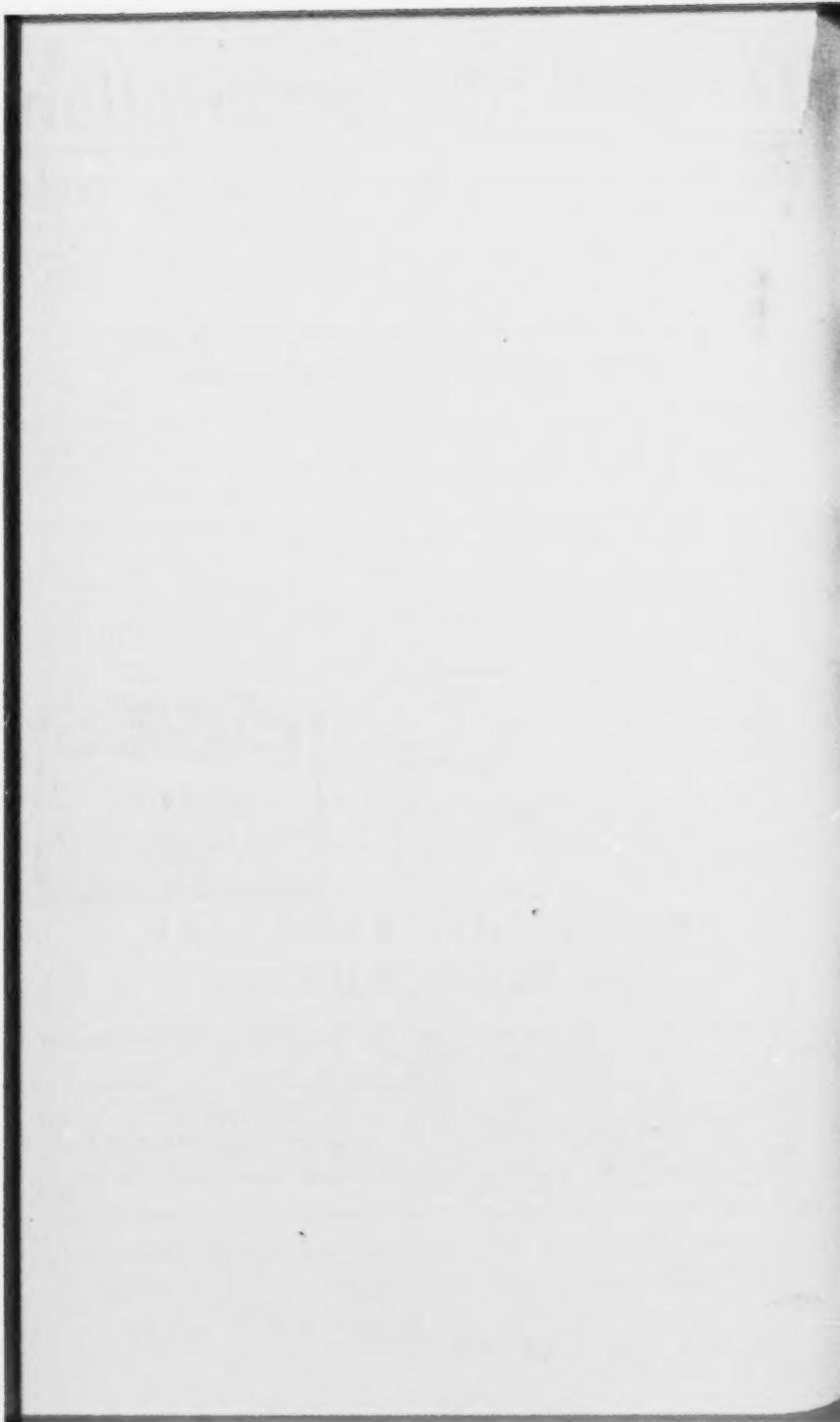
U. S. District Court, N. D. O.

The Socialist party of Cleveland has shown the way in the fight against conscription by adoption of this resolution:

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party  
SOCIALIST PARTY OF OHIO—1291-Cook Ave., Lakewood, O.

*Govt Ex 27102*



# YOUNG MEN

are you going to

# REFUSE TO REGISTER

for military service in a foreign country

# WHILE THE RICH MEN

**FILED**  
CIV. 211917  
To Clerk  
B. C. MILLER, Com.  
U. S. District Court, N. D. O.

who have brought on this war

# STAY AT HOME

and get richer by gambling in food stuffs?

---

We would rather die, or be imprisoned, for the sake of justice, than kill our fellow men in this unjust war.

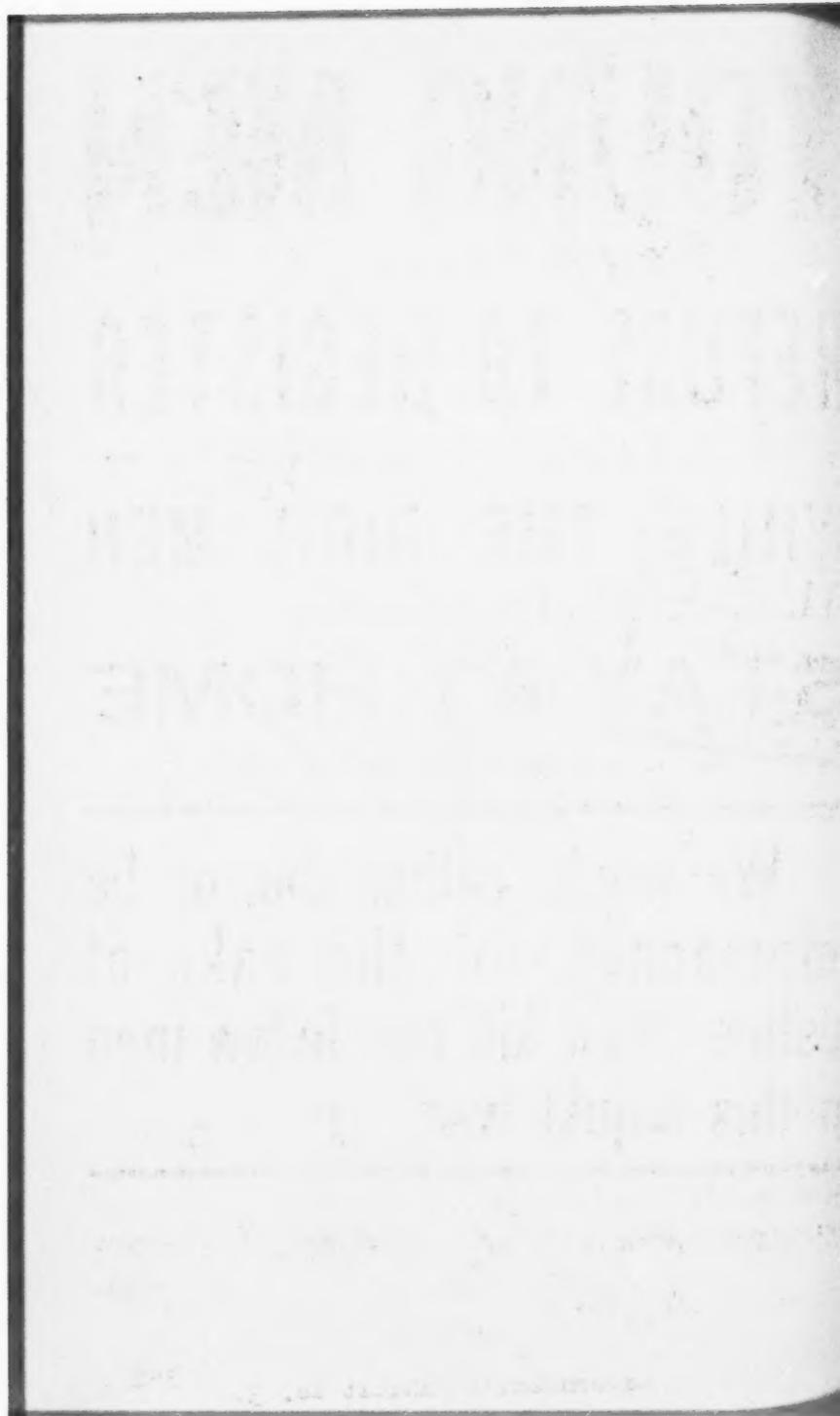
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SIGNED,

Young Men's Anti-Militarist League

Govt. Ex. 3  
T. M.

Government's Exhibit No. 3.



# PROCLAMATION and WAR PROGRAM

The Socialist Party of the United States in the present grave crisis, solemnly reaffirms its allegiance to the principle of internationalism and working class solidarity the world over, and proclaims its unalterable opposition to the war just declared by the government of the United States.

Modern wars as a rule have been caused by the commercial and financial rivalry and intrigues of the capitalist interests in the different countries. Whether they have been frankly waged as wars of aggression or have been hypocritically represented as wars of "defense", they have always been made by the classes and fought by the masses. Wars bring wealth and power to the ruling classes, and suffering, death and demoralization to the workers.

They breed a sinister spirit of passion, unreason, race hatred and false patriotism. They obscure the struggles of the workers for life, liberty and social justice. They tend to sever the vital bonds of solidarity between them and their brothers in other countries, to destroy their organizations and to curtail their civic and political rights and liberties.

The Socialist Party of the United States is unalterably opposed to the system of exploitation and class rule which is upheld and strengthened by military power and sham national patriotism. We, therefore, call upon the workers of all countries to refuse support to the governments in their wars. The wars of the contending national groups of capitalists are not the

concern of the workers. The only struggle which would justify the workers in taking up arms is the great struggle of the working class of the world to free itself from economic exploitation and political oppression, and we particularly warn the workers against the stated and delusion of defensive warfare. As against the false doctrine of national patriotism we uphold the ideal of international working-class solidarity. In support of capitalism, we will not willingly give a single life or a single dollar; in support of the struggle of the workers for freedom we pledge our all.

The mad orgy of death and destruction which is now convulsing unfortunate Europe was caused by the conflict of capitalist interests in the European countries.

In each of these countries, the workers were oppressed and exploited. They produced enormous wealth but the bulk of it was withheld from them by the owners of the industries. The workers were thus deprived of the means to repurchase the wealth which they themselves had created.

The capitalist class of each country was forced to look for foreign markets to dispose of the accumulated "surplus" wealth. The huge profits made by the capitalists could no longer be profitably reinvested in their own countries, hence, they were driven to look for foreign fields of investment. The geographical boundaries of each modern capitalist country thus became too narrow for the industrial and commercial operations of its capitalist class.

FILED  
JUL 21 1917  
10 o'clock  
U. S. District Court, N. D. O.

Defendant's Exhibit No. 1.

The efforts of the capitalists of all leading nations were therefore centered upon the domination of the world markets. Imperialism became the dominant note in the politics of Europe. The acquisition of colonial possessions and the extension of spheres of commercial and political influence became the object of diplomatic intrigues and the cause of constant clashes between nations.

The acute competition between the capitalist powers of the earth, their jealousies and distrusts of one another and the fear of the rising power of the working class forced each of them to arm to the teeth. This led to the mad rivalry of armament, which, years before the outbreak of the present war, had turned the leading countries of Europe into armed camps with standing armies of many millions, drilled and equipped for war in times of "peace."

Capitalism, imperialism and militarism had thus laid the foundation of an inevitable general conflict in Europe. The ghastly war in Europe was not caused by an accidental event, nor by the policy or institutions of any single nation. It was the logical outcome of the competitive capitalist system.

The six million men of all countries and races who have been ruthlessly slain in the first thirty months of this war, the millions of others who have been crippled and maimed, the vast treasures of wealth that have been destroyed, the untold misery and sufferings of Europe, have not been sacrifices exacted in a struggle for principles or ideals, but wanton offerings upon the altar of private profit.

The forces of capitalism which have led to the war in Europe are even more hideously transparent in the war recently provoked by the ruling class of this country.

When Belgium was invaded, the government enjoined upon the peo-

ple of this country the duty of remaining neutral, thus clearly demonstrating that the "dictates of humanity", and the fate of small nations and of democratic institutions were matters that did not concern it. But when our enormous war traffic was seriously threatened our government calls upon us to rally to the "defense of democracy and civilization."

Our entrance into the European war was instigated by the predatory capitalists in the United States who boast of the enormous profits of seven billion dollars from the manufacture and sale of munitions and war supplies and from the exportation of American food stuffs and other necessities. They are also deeply interested in the continuance of war and the success of the allied arms through their huge loans to the governments of the allied powers and through other commercial ties. It is the same interests which strive for imperialistic domination of the Western Hemisphere.

The war of the United States against Germany cannot be justified even on the plea that it is a war in defense of American rights or American "honor." Ruthless as the unrestricted submarine war policy of the German government was and is, it is not an invasion of the rights of the American people as such, but only an interference with the opportunity of certain groups of American capitalists to coin cold profits out of the blood and sufferings of our fellow men in the warring countries of Europe.

It is not a war against the militarist regime of the Central Powers. Militarism can never be abolished by militarism.

It is not a war to advance the cause of democracy in Europe. Democracy can never be imposed upon any country by a foreign power by force of arms.

It is cant and hypocrisy to say

that the war is not directed against the German people, but against the Imperial Government of Germany. If we send an armed force to the battlefields of Europe, its cannon will mow down the masses of the German people and not the Imperial German Government.

Our entrance into the European conflict at this time will serve only to multiply the horrors of the war, to increase the toll of death and destruction and to prolong the fiendish slaughter. It will bring death, suffering and destitution to the people of the United States and particularly to the working class. It will give the powers of reaction in this country the pretext for an attempt to throttle our rights and to crush our democratic institutions, and to fasten upon this country a permanent militarism.

The working class of the United States has no quarrel with the working class of Germany or of any other country. The people of the United States have no quarrel with the people of Germany or any other country. The American people did not want and do not want this war. They have not been consulted about the war and have had no part in declaring war. They have been plunged into this war by the trickery and treachery of the ruling class of the country through its representatives in the National Administration and National Congress, its demagogic agitators, its subsidized press, and other servile instruments of public expression.

We brand the declaration of war by our government as a crime against the people of the United States and against the nations of the world.

In all modern history there has been no war more unjustifiable than the war in which we are about to engage.

No greater dishonor has ever been forced upon a people than that

which the capitalist class is forcing upon this nation against its will.

In harmony with these principles, the Socialist Party emphatically rejects the proposal that in time of war the workers should suspend their struggle for better conditions. On the contrary, the acute situation created by war calls for an even more vigorous prosecution of the class struggle, and we recommend to the workers and pledge ourselves to the following course of action:

1. Continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.

2. Unyielding opposition to all proposed legislation for military or industrial conscription. Should such conscription be forced upon the people, we pledge ourselves to continuous efforts for the repeal of such laws and to the support of all mass movements in opposition to conscription. We pledge ourselves to oppose with all our strength any attempt to raise money for payment of war expense by taxing the necessities of life or issuing bonds which will put the burden upon future generations. We demand that the capitalist class, which is responsible for the war, pay its cost. Let those who kindled the fire furnish the fuel.

3. Vigorous resistance to all reactionary measures, such as censorship of press and mails, restriction of the rights of free speech, assemblage, and organization, or compulsory arbitration and limitation of the right to strike.

4. Consistent propaganda against military training and militaristic teaching in the public schools.

5. Extension of the campaign of education among the workers to organize them into strong, class-conscious, and closely unified politi-

cal and industrial organizations, to enable them by concerted and harmonious mass action to shorten this war and to establish lasting peace.

6. Widespread, educational propaganda to enlighten the masses as to the true relation between capitalism and war, and to rouse and organize them for action, not only against present war evils, but for the prevention of future wars and for the destruction of the causes of war.

7. To protect the masses of the American people from the pressing danger of starvation which the war in Europe has brought upon them, and which the entry of the United States has already accentuated, we demand:

(a) The restriction of food exports so long as the present shortage continues, the fixing of maximum prices, and whatever measures may be necessary to prevent the food speculators from holding back the supplies now in their hands;

(b) The socialization and democratic management of the great industries concerned with the production, transportation, storage, and the marketing of food and other necessities of life;

(c) The socialization and democratic management of all land and other natural resources now held out of use for monopolistic or speculative profit.

These measures are presented as means of protecting the workers against the evil results of the present war. The danger of recurrence of war will exist as long as the capitalist system of industry remains in existence. The end of wars will come with the establishment of socialized industry and industrial democracy the world over. The Socialist Party calls upon all the workers to join it in its struggle to reach this goal, and thus bring into the world a new society in which peace, fraternity, and human brotherhood will be the dominant ideals.

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# DEMONSTRATION

FOR PEACE AND AGAINST CONSCRIPTION

## Public Square

Sunday, May 6th, 2:30 P. M.

GOOD SPEAKERS.

Make your voice heard for peace and against Prussianizing this country.

Subscribe to The American Socialist, issued by the National Office of the Socialist Party, 803 West Madison Street, Chicago, Ill., 50c per year; 25c for six months.



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## GOVERNMENT'S EXHIBIT No. 4.

Lakewood, Ohio,

May 25, 1917.

Postmaster, East Palestine, Ohio.

DEAR SIR: About a week ago two packages of printed matter were addressed to the East Palestine, post office in the name of A. A. Hennacy, General Delivery. Mr. Hennacy informs us that he only received one package and that it had been opened.

I write you now to request that you forward the other package in your possession to A. A. Hennacy, General Delivery, Martins Ferry, Ohio. If this is not done, and if by tracing we can find that you interfered with the delivery of this second package to the addressee, we shall immediately refer the case to our attorney and institute the proper proceedings.

Yours respectfully,

A. WAGENKNECHT,  
*State Secretary.*

Sufficient postage for forwarding the package is enclosed.

Filed Jul. 21, 1917, at — o'clock — M. B. C. Miller, Clerk, U. S.  
District Court, N. D. O.  
Govt.'s Ex. 4. F. H. R.

(Here follows fac-simile circular marked page 354.)

355      Government's Exhibit No. 27, being a package addressed to A. A. Hennacy, General Delivery, East Palestine, Ohio, about twelve inches in height, about twelve inches in width, and about eighteen inches in length, the contents thereof being printed dodgers or circulars headed "Down with Conscription" and at the bottom of the aforesaid printed dodgers or circulars there appearing words and phrases of the following tenor: "One of the millions of leaflets issued by the Socialist Party—Socialist Party of Ohio—1291 Cook Ave., Lakewood, Ohio," the said package and the contents thereof being wrapped with brown wrapping paper, and the circulars contained in the package as aforesaid being set forth herein in full, reads as follows:

Down With Conscription.

The 13th Amendment to the Constitution of the United States reads:

"Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any places subject to their jurisdiction."

Conscription is the Worst Form of Involuntary Servitude.

The conscription law which the Wilson administration intends to put into effect proposes that the young men of this nation shall be taken from their homes against their will, and sent to the trenches of France to murder and be murdered in a war over the commercial interests of the capitalist class.

Daniel Webster, one of the greatest American statesman, said this of conscription in the Congress of this country, Dec. 9, 1814:

"Is this consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No sir, it is not. The constitution is libeled, foully libeled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their treasures and their own blood a Magna Charta to be slaves. Where is it written in the constitution, in what article or section is it contained, that you may take children from their parents \* \* \* compel them to fight the battles of any war in which the follies or the wickedness of the government may engage? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest right of personal liberty?"

Every man who is determined to uphold the "dearest right of personal liberty," every man who refuses to become a victim of the war declared by the government to protect the millions loaned the Allies by the capitalists of this country, should

## Refuse to Register for Conscription.

The Socialist party of Cleveland has shown the way in the fight against conscription by adoption of this resolution:

Resolved, by the Socialist Party in joint meeting assembled, that we denounce the law proposing "involuntary servitude," in violation of the 13th amendment of the Constitution of the United States, in the form of conscription to murder our fellow human beings in other lands, and recommend to and urge all members of the party, and the workers generally, that they refuse to register for conscription and pledge to them our financial and moral support in their refusal to become the victims of the ruling class.

One of the millions of leaflets issued by the Socialist Party.

## SOCIALIST PARTY OF OHIO.

1291 Cook Ave., Lakewood, O.

356

*Petition for Writ of Error.*

(Filed July 25, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

*Petition for Writ of Error.*

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, by Morris H. Wolf and Joseph W. Sharts, their attorneys, and say that on the 25th day of July, A. D. 1917, this Court entered judgment herein against these defendants, in which judgment and the proceedings, had, prior thereto in this cause, certain errors were committed, to the prejudice of these defendants, involving a construction of the Constitution of the United States, all of which will more fully appear in the assignment of errors which is filed with this petition.

Wherefore, these defendants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of the errors so complained of, and that transcript

of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States.

CHARLES E. RUTHENBERG,  
ALFRED WAGENKNECHT,  
CHARLES BAKER,

*Defendants.*

MORRIS H. WOLF,  
JOSEPH W. SHARTS,

*Attorneys for Defendants.*

*Assignment of Error.*

(Filed July 25, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

*Assignment of Error.*

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, and plaintiffs in error, and each for himself and jointly make and file this, their assignment of error:

1. The trial Court erred in requiring these defendants to present evidence to support their challenges to the grand and petit jury arrays without any demurrer or answer or exceptions filed thereto by the prosecution.

2. The trial Court erred in refusing to admit the testimony of R. E. Miller, Clerk of the Court, to show that he was an adherent of the Republican Party, that the other jury commissioner, George S. May, was a member of the Democratic Party, and that the Socialist Party, of which defendants were members and officers, was a minor political party within the District and was without representation on the jury board; contrary to their constitutional right to an impartial jury.

3. The Trial Court erred in refusing to admit the testimony — the Clerk of Cuyahoga County Board of Elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the

358 Republican and Democratic Parties, and for that and other reasons hostile to and prejudiced against these defendants as members of the Socialist Party; and that there were and are numerous persons in said District qualified to serve on said

juries, who are members of the Socialist Party, but are excluded from such service by reason of their adherence to said party; contrary to defendants' right to an impartial jury and the equal protection of the law and due process of the law, and contrary to Sec. 276 Judicial Code and the grant of equal rights under the Act of May 31st, 1870, c. 114, Sec. 16.

4. The Trial Court erred in refusing to admit said testimony offered for the purpose of showing that the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of land-owners, property-owners, and capitalists, and that the names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners and capitalists and that defendants are all proletarians, that is to say, landless and propertyless wage workers, who as Socialists advocate the rights of proletarians as opposed to landlords, employers and capitalists, and urge the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury box; and that said jurors so drawn are and of necessity must be, by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition; and that there were many thousands of persons in said District qualified to serve on said juries who do not derive their income from Rent, Interest or Profit and would therefore not be rendered hostile to and prejudiced against defendants  
359 because of private interests, but that said persons are excluded from said jury service; contrary to the constitutional rights of defendants as above set forth.

5. The Trial Court erred in refusing to sustain said challenge on the ground that the juries were selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

6. The Trial Court erred in refusing to sustain the challenge on the ground that the jury box from which were drawn the names for said juries had not been emptied at any time within recent years nor refiled since November, 1916, many months prior to said drawings, that no evidence was obtainable of the number — qualified names in said jury box at the time of said drawings, and in fact said box did not, at the time of said drawings contain the names of 300 qualified persons as required by Judicial Code, Sec. 276; and that many of the names in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who had not held office for more than a year prior to said drawings; and that of the persons sitting on said alleged grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three had been so selected and their names put in said box by said Sullivan; contrary to Sec. 276 Judicial Code.

7. The Trial Court erred in refusing to sustain said challenge on the ground that the Marshal and his Deputy, who served the writs

of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the

Democratic Party and Political adversaries of the defendants,  
360 and in refusing to admit the testimony of said Marshal, Charles W. Lapp; that he was a member of the Democratic Party.

8. The Trial Court erred in refusing to sustain said challenge on the ground that said Marshal did not summon nor return the entire venire of 30 names for grand jury service as required by order of the Court and as drawn by the Clerk, but only 19 thereof; and had made no return of the venire for the petit jury drawn for service after said grand jury was drawn.

9. The Trial Court erred in refusing to sustain said challenge on the ground that the jury box used for said drawings, was small and rectangular, and incapable of being rotated so as to mingle the names and that there was in fact, no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box the names for these proceedings; and that said Clerk, did in fact, select from said box the names exclusively of adherents of the political parties adverse to that of defendants, said adherents being persons likely to be and in fact hostile to and prejudiced against these defendants; contrary to the defendants' constitutional right of due process of law and of trial by an impartial jury of their peers.

10. The Trial Court erred in refusing to sustain said challenge on the ground that all of said jurors, both inside and outside the City of Cleveland, were summoned by mail, and that the actual delivery of the summons in such cases was not by any official of the Court or other qualified person, but by a person unknown, to wit, a letter carrier; and that in four instances the registry card which was returned had, not been signed by the person summoned  
361 but by someone else; and that of the said grand jurors so summoned by mail seven were designated not by their

Christian names but by initial only, and the summons mailed not to any street number but simply to the Town or C'ty, where such person was believed to reside; and that 9 of the persons summoned by mail for the petit jury, were designated in the same manner; that by reason of these neglects of all safe-guards both as to the manner of serving the summons and the identity of the persons so summoned defendants were deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

11. The Trial Court erred in refusing to sustain the challenge on the ground that the Clerk, without an order of the Court, directing him to select any parts of said Division, in drawing the names for said grand jury did not draw any names from 7 of the Counties of the Division but drew 6 from Cuyahoga County; and in drawing the names for said petit jury the Clerk, without an order of Court, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but drew none from 8 counties, within said Division; contrary to Sec.

277 Judicial Code and the constitutional right of defendants to be tried by an impartial jury of the State and District.

12. The Trial Court erred in failing to sustain said challenge in any or all of its counts and in overruling same.

13. The Trial Court erred in refusing to sustain the defendants' "motion to quash" on the ground that one D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without any one of such names having been selected or summoned.

14. The Trial Court erred in overruling said motion to 362 quash on the ground that said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

15. The Trial Court erred in overruling said motion to quash on the ground that endorsements, not provided by law, and prejudicial to defendants, were placed on the back of said indictment, to-wit, the signature of the District Attorney beneath the signature of the foreman of the grand jury.

16. The Trial Court erred in overruling said motion on the ground that the indictment failed to show that the events constituting the alleged offense occurred before the sitting of said grand jury and before the finding of said indictment.

17. The Trial Court erred in overruling said motion on the ground that the indictment fails to show that the grand jurors were of the necessary qualifications, were of the body of the State and District, and sitting within the District, or of the jurors who found the indictment.

18. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said Alphons J. Schue, was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen, at the time said offense is alleged to have been committed.

19. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said proclamation had been published at the time said offense is alleged to have been committed, by these defendants, or was ever published.

363 20. The Trial Court erred in overruling said motion on the ground that said indictment fails to negative the possible appointments provided in Subdivision Third, of Section 1 of the Draft Act.

21. The Trial Court erred in overruling said motion on the ground that said indictment alleges three separate offenses in one count.

22. The Trial Court erred in overruling said motion on the ground that said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce and procure said Schedule to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

23. The Trial Court erred in overruling said motion on the ground that these defendants are charged therein as accessories to a misdemeanor.

24. The Trial Court erred in refusing to permit the filing of defendants' plea in abatement and refusing to hear the several grounds set forth therein, namely:

(a) That the names placed in the jury box from which these juries were drawn had been selected and put there by jury commissioners appointed on partisan consideration and *and* from only the Democratic and Republican Parties, and without any representative of the Socialist Party; that said jury commissioners were hostile to these defendants;

(b) That all the names so selected and put in the jury box were the names of adherents of the Republican and Democratic Parties exclusively and that the names of members of the Socialist Party had been excluded from said box because of their political affiliation;

364 (c) That the names so selected and put in said jury box had been taken exclusively, or almost exclusively, from the names of land-owners, property-owners, capitalists and employers, and the names drawn from said box for these juries were the names exclusively of land-owners, property-owners capitalists and employers, who by reason of their private interests were hostile to and prejudiced against these defendants;

(d) That said juries had been selected and drawn from only a part of the Northern District of Ohio, instead of the entire District;

(e) That the jury box had not been emptied at any time within recent years, nor re-filled since November, 1916, many months before said drawings, and said box did not at the time of said drawing, contain the names of 300 qualified persons; that many of the names therein had been selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings; that three of the persons on said grand jury had been so selected by Sullivan and 3 on the petit jury.

(f) That the Clerk of the Court in the presence of the Marshal, both being political adversaries of these defendants and opposed to and prejudiced against them had selected from the box the names for jury service, and said names had been selected exclusively from adherents of the Republican and Democratic Parties who were likely to be and in fact were hostile to and prejudiced against these defendants; in violation of defendants' constitutional right of due process of law and trial by an impartial jury;

(g) That said Marshal and his Deputy, who served the writs of venire for both of said juries were not "indifferent persons," but active partisans of the Democratic Party and political adversaries of these defendants;

365 (h) That said Marshal did not summon the 30 men for grand jury service as ordered by the Court and drawn by the Clerk, but selected and summoned only 19 thereof;

(i) That all persons summoned for said grand and petit juries

were summoned by mail, including several residents of Cleveland, Ohio;

(j) That one D. E. Grager was sworn as a grand juror, no such name having been drawn from the jury box, nor any one of that name summoned;

(k) That the Clerk in drawing the grand jury, drew 6 from Cuyahoga County alone and none from seven of the counties; and in drawing the petit jury Clerk, without any order of the Court, directing such selection, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but none from eight counties, in violation of Sec. 277 Judicial Code, and the constitutional right of defendants to an impartial jury of the State and District.

(l) That said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case;

(m) That said grand jurors were not of the necessary qualifications were not of the body of the State and District, nor properly constituted a grand jury.

25. The Trial Court erred in overruling a demurrer on the ground that the facts set forth therein do not constitute an offense against the laws of the United States.

366 26. The Trial Court erred in overruling said demurrer on the ground that the indictment charges these defendants with being accessories to a misdemeanor;

27. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege the events or acts as occurring prior to the finding of the indictment.

28. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege that it was presented by a grand jury, "duly impaneled and sworn," and in, of, and for the District.

29. The Trial Court erred in overruling the demurrer on the ground that the Act of May 18th, 1917, known as the Draft Act, and the Proclamation of said date, were unconstitutional on the following grounds:

(a) Said Act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;

(b) Said Act deprives men of their liberty without due process of law in violation of Amendment V of the United States Constitution;

(c) Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;

(d) Said Act violates Article 1 Section 8 Clause 15 of the United States Constitution;

(e) Said Act violates Article 1, Section 8, Clause 16 of the United States Constitution;

(f) Said Act in Section IV thereof, violates Article 3, Section 1 and Article 1, Section 8, Clause 9 of the United States Constitution;

(g) Said Act violates Article II, Section 2 of the United States Constitution;

(h) Said Act violates Article 10 of the amendments of the United States Constitution;

367 (i) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in the Preamble of the United States Constitution.

30. The Trial Court erred in refusing to grant to these defendants separate trials, because under the circumstances it was impossible to introduce evidence as to one of the defendants without thereby prejudicing all as members of the said political organization.

31. The Trial Court erred in overruling defendants' challenge to the petit jury array, made after examination, on the ground that the defendants had been misled as to what jury would try the case, and that said panel had been drawn before the grand jury which brought in the indictment.

32. The Court erred in admitting, as against the defendants, over their objection and exception, certain testimony of the witness, Alphons J. Schue, in substance as follows:

Q. When did you first learn of the conscription law or the registration law?

A. I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please, the Act under which this indictment is drawn was passed on a certain date (May 18th) and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that subject to certain restrictions, but the question is not open to objection on that ground.

Q. On the 20th of May, and prior thereto, what was his intent and purpose with respect to the registration provisions of that law?

368 The objection would be overruled. (Exception by defendant.)

A. I would have certainly registered if I had not heard about these Socialist Peace Meetings.

33. The Court erred in admitting the said testimony as against defendants, Ruthenberg and Wagenknecht.

34. The Court erred in admitting testimony over the objection and exception of defendants, as against the defendants, Ruthenberg and Wagenknecht, regarding the speech of Charles Baker of May 20th, in substance as follows:

Q. Now do you recall what Baker said on the 20th of May, 1917, in substance. Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say that you can recall?

A. And he told about the standpoint of the Socialist Party, the

way they voted against conscription and that it was taken by the Local here that all Socialists would refuse to register.

Q. What is the last part of the answer?

A. That all Socialists would refuse to register and induce others, telling them that they would have the full support of the Socialist Party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory, I will ask you if you recall if he said anything about himself registering personally?

Mr. Sharts: I object to putting a suggestion like that in the question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance what you remember as to Mr. Baker's speech on the 20th of May at the Public Square. Is that correct?

369 The Witness: Yes, sir.

The Court: You may put the question, Mr. Wertz. (Exception by defendant-.)

The Witness: He said he would refuse to register, he being of military age.

Q. Do you know whether or not, he did, in fact register?

Mr. Sharts: I object.

The Court: The objection to that will be sustained.

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney, anything in addition to what has already been said what Mr. Baker said on the subject with reference to being shot before registering. (Exception by defendant-.)

A. He said he would rather be shot here as a man than shot in the trenches of Europe as a dog.

35. The Court erred in admitting evidence of the speeches of Wagenknecht and Ruthenberg on May 27th as against Baker, and in overruling the motion for a new trial based on that point.

36. The Court erred in refusing the request of defendants, that the testimony of James L. Lind, as follows, be stricken out:

Question by Mr. Sharts: This statement that you refer to, was it at the police station?

A. Yes, in the Police Inspector's office.

Q. Was Mr. Schue present?

A. I don't think so. I don't know Mr. Schue.

370 Mr. Sharts: If your Honor please, I am going to ask to have the testimony of this witness, with regard to any admis-

sions made by Mr. Wagenknecht, at the police station, stricken out, as not having been made in the presence of Mr. Schue.

The Court: I will overrule your request and you may have your exception but I will make this statement in addition to that.

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony made by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

37. The Court erred in admitting the introduction of evidence by Wilbur D. Bacon, and permitting the introduction of a leaflet purporting to have been approved at a meeting attended by the said Wilbur D. Bacon, on May 13th, 1917, and at which meeting defendants, Ruthenberg and Wagenknecht were present, on the ground that the said leaflet was alleged to have been approved by some of defendants on May 13th or five days prior to the passage of the Act.

38. The Trial Court erred in refusing to permit these defendants to rebut evidence of intent by producing evidence that they had constantly advised registration when inquired of.

39. The Trial Court erred in refusing to direct a verdict for the defendants or any one of them or two of them at the close of the plaintiff's testimony, there having been *so* corroborative evidence offered to support the statements of defendant Schue, who was an alleged accomplice.

371 40. The Trial Court erred in not directing a verdict for the defendants at the close of all the testimony, for the same reason.

41. The Trial Court erred in overruling the motion of the defendants for a new trial for the reasons therein given, and particularly on the ground of newly discovered evidence tending to show that Schue perjured himself on the witness stand in saying that he had had no connection with the Socialist organization other than to attend the meetings of May 20th and May 27th.

42. The Trial Court erred in overruling the motion in arrest of judgment for the reasons therein given, wherefore the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, each for himself and jointly pray that the judgment and sentence herein may be reversed and held for naught.

CHARLES E. RUTHENBERG.

ALFRED WAGENKNECHT.

CHARLES BAKER.

MORRIS H. WOLF,

JOSEPH W. SHARTS,

*Attorneys for Defendants.*

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*Amended Assignment of Error.*

(Filed July 31, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendant.

*Amended Assignment of Error.*

Now come Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants herein, and plaintiffs in error, and each for himself and jointly make and file this, their assignment of error:

1. The Trial Court erred in requiring these defendants to present evidence to support their challenges to the grand and petit jury arrays without any demurrer or answer or exceptions filed thereto by the prosecution.

2. The Trial Court erred in refusing to admit the testimony of B. C. Miller, Clerk of the Court, to show that he was an adherent of the Republican Party, that the other jury commissioner, George S. May, was a member of the Democratic Party, and that the Socialist Party, of which defendants were members and officers, was a minor political party within the District and was without representation on the jury board; contrary to their constitutional right to an impartial jury.

3. The Trial Court erred in refusing to admit the testimony — the Clerk of Cuyahoga County Board of Elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic Parties, and for that and other reasons, hostile to and prejudiced against these defendants as members of the Socialist Party; and that there were and are numerous persons

373 in said District qualified to serve on said juries, who are members of the Socialist Party, but are excluded from such service by reason of their adherence to said party; contrary to defendants' right to an impartial jury and the equal protection of the law and due process of the law, and contrary to Sec. 276 Judicial Code and the grant of equal rights under the Act of May 31st, 1870, C. 114, Sec. 16.

4. The Trial Court erred in refusing to admit said testimony offered for the purpose of showing that the names so selected and placed in said jury-box were taken exclusively, or almost exclusively, from the names of land-owners, property-owners, and capitalists, and that the

names drawn and picked from said box for the grand and petit juries herein are names exclusively of land-owners, property-owners and capitalists and that defendants are all proletarians, that is to say, landless and propertyless wage workers, who as Socialists advocate the rights of proletarians as opposed to landlords, employers and capitalists, and urge the abolition of Rent, Interest, and Profit, which are the principal sources of income of the jurors so drawn and of the others whose names were placed in said jury box; and that said jurors so drawn are and of necessity must be, by reason of their private interests hostile to and prejudiced against these defendants as Socialists and as advocates of such abolition; and that there were many thousands of persons in said District qualified to serve on said juries who do not derive their income from Rent, Interest or Profit and would therefore not be rendered hostile to and prejudiced against defendants because of private interests, but that said persons are excluded from said jury service; contrary to the constitutional rights of defendants as above set forth.

374 5. The Trial Court erred in refusing to sustain said challenge on the ground that the juries were selected and drawn exclusively from the Eastern Division of the Northern District of Ohio, instead of from the entire District, contrary to the Sixth Amendment of the Constitution of the United States.

6. The Trial Court erred in refusing to sustain the challenge on the ground that the jury-box from which were drawn the names for said juries had not been emptied at any time within recent years nor refilled since November, 1916, many months prior to said drawings, that no evidence was obtainable of the number of qualified names in said jury-box at the time of said drawings, and in fact said box did not, at the time of said drawings, contain the names of 300 qualified persons as required by Judicial Code, Sec. 276; and that many of the names in said box were selected and put there by one Jeremiah J. Sullivan, a former commissioner who had not held office for more than a year prior to said drawings; and that of the persons sitting on said alleged grand jury three had been so selected and their names put in said box by said Sullivan; and of the persons drawn for said petit jury three had been so selected and their names put in said box by said Sullivan; contrary to Sec. 276 Judicial Code.

7. The Trial Court erred in refusing to sustain said challenge on the ground that the Marshal and his Deputy, who served the writs of venire for both of said juries were not "indifferent persons" as required by Sec. 279 Judicial Code, but active adherents of the Democratic Party and political adversaries of the defendants, and in refusing to admit the testimony of said Marshal, Charles W. Lapp, that he was a member of the Democratic Party.

375 8. The Trial Court erred in refusing to sustain said challenge on the ground that said Marshal did not summon nor return the entire venire of 30 names for grand jury service as required by order of the Court and as drawn by the Clerk, but only 19 thereof; and has made no return of the venire for the petit jury drawn for service after said grand jury was drawn.

9. The Trial Court erred in refusing to sustain said challenge on

the ground that the jury box used for said drawings, was small and rectangular, and incapable of being rotated so as to mingle the names and that there was in fact, no attempt to draw said names by lot, but the Clerk of the Court, in the presence of the Marshal, both of whom were political adversaries of defendants and hostile to them, selected from said box the names for these proceedings; and that said Clerk, did in fact, select from said box the names exclusively of adherents of the political parties adverse to that of defendants, said adherents being persons likely to be and in fact hostile to and prejudiced against these defendants; contrary to the defendants' constitutional right of due process of law and of trial by an impartial jury of their peers.

10. The Trial Court erred in refusing to sustain said challenge on the ground that all of said jurors, both inside and outside the City of Cleveland, were summoned by mail, and that the actual delivery of the summons in such cases was not by any official of the Court or other qualified person, but by a person unknown, to wit, a letter carrier; and that in four instances the registry card which was returned had not been signed by the person summoned but by some one else; and that of the said grand jurors so summoned by mail seven were designated not by their Christian names but by initial only, and the summons mailed not to any street number but 376 simply to the Town or City, where such person was believed to reside; and that 9 of the persons summoned by mail for the petit jury, were designated in the same manner; that by reason of these neglects of all safe-guards both as to the manner of serving the summons and the identity of the persons so summoned defendants were deprived of their constitutional right of due process of law and of trial by an impartial jury of the State and District.

11. The Trial Court erred in refusing to sustain the challenge on the ground that the Clerk, without an order of the Court, directing him to select any parts of said Division, in drawing the names for said grand jury, did not draw any names from 7 of the Counties of the Division but drew 6 from Cuyahoga County; and in drawing the names for said petit jury, the Clerk, without an order of Court, drew 5 from Cuyahoga, 4 from Columbiana, and 3 from Ashtabula, but drew none from 8 counties, within said Division; contrary to Sec. 277 Judicial Code and the constitutional right of defendants to be tried by an impartial jury of the State and District.

12. The Trial Court erred in failing to sustain said challenge in any or all of its counts and in overruling same.

13. The Trial Court erred in not requiring the prosecution to file, either an answer or a demurrer to defendant's challenge to the array, as is evident from the following testimony:

(By Mr. Sharts:)

Q. If your Honor please, there has been nothing filed in the District Attorney's office, either in the way of a demurrer or an exception, or an answer and for that reason, we have been unable to state that an issue has been made up.

The Court: No issues are required. No answer is required.  
377 No exception is required. They may object to the sufficiency of the affidavit if they wish to submit it that way instead of to present such evidence as they may see fit to present.

Mr. Sharts: If your Honor will permit me, I will take an exception. Enter an exception to the ruling of the Court.

The Court: An exception to what?

Mr. Sharts: An exception to the ruling of the Court that neither an answer or exceptions or a demurrer are required before testimony.

The Court: As I understand you, Mr. Sharts, as the matter now stands, you have no evidence to offer except the affidavit.

Mr. Sharts: If your Honor please, if we had understood that there was to be testimony introduced, that is, that the Court was ready to hear evidence, we would have had our subpoenas issued now. We would have subpoenaed the Clerk of the Board of Elections, to produce his books and we had also intended to produce evidence from the outside towns in this District regarding the list of names of the jurors that have been selected for jury service and we are prepared to show that the statements in our challenge are true, but, as there has been no answer filed, we were not, of course, looking for a presentation of evidence this afternoon. We supposed it would be on demurrer to the challenge.

The Court: No pleadings to a challenge to an array or panel are required. They stand in the same was as a challenge to a juryman who is being paroled and its trial by the Court without any formality.

14. The Trial Court erred in not sustaining the challenge of defendants on the ground that one of the jury commissioners was a resident of the Western Division and another jury commissioner had not been in office for some time prior to the impanelling 378 of this jury, and that therefore there were not sufficient names in the jury box at the time the names for the last jury were drawn, as is evident from the following testimony:

(By Mr. Sharts:)

Q. Mr. Clerk, state your name.

A. B. C. Miller.

Q. Your occupation?

A. Clerk of the United States District Court for the Northern District of Ohio.

Q. How long have you occupied that position?

A. Since December, 1909, of the District Court since January, 1912.

Q. Who have been the jury commissioners in conjunction with you, during your term of office?

A. Jeremiah J. Sullivan, of Cleveland, and George S. May, of Napoleon, Henry County, Ohio.

Q. When did Jeremiah J. Sullivan cease to be a jury commissioner?

A. Approximately a year ago. I can give you the exact date from my papers.

Q. I wish you would.

A. On August 4th, 1916, the resignation of J. J. Sullivan as jury commissioner for the Northern District of Ohio, was accepted and George S. May, Esquire, of Napoleon, Ohio, was appointed as jury commissioner in his stead.

Q. Do you know where Jeremiah J. Sullivan now resides?

A. I understand in Cleveland, Ohio.

Q. Still in Cleveland?

A. Yes, sir.

Q. And does George S. May, jury commissioner, reside in the Eastern Division of this Court?

A. No, he resides in the Western Division.

379 15. The Court erred in sustaining the objection of the District Attorney to a question by defendants, as is evident from the following testimony:

Q. What were the political principles of Mr. Sullivan?

Mr. Wertz: I object.

The Court: I think that I will sustain the objection to that question, but permit you to put the inquiry in the language of the statute. As to whether or not he was a member of the dominant political party, opposed that of the Clerk, I think that is the extent of the legitimate inquiry. I do not believe it is permissible to prove whether he was a prohibitionist, or Republican or Democrat or any other political party, that it was opposed to that of the Clerk's.

Mr. Sharts: Enter an exception to the ruling of the Court.

16. The Court erred in refusing the Clerk, B. C. Miller, to state the names of the principal political parties in the District; to state Miller's own political affiliation and to state what were the political affiliations of Mr. May, as is evident from the following testimony:

(By Mr. Sharts:)

Q. Can you give the names of the principal political parties in the District?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Exception.

Q. What is your political affiliation?

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception.

Q. State whether or not Mr. Sullivan was a well-known member of a political party opposed to your own?

A. He was.

Q. Can you state how well-known?

380 The Court: Do you think that that is susceptible of an answer, Mr. Sharts?

Mr. Sharts: I would suppose we were entitled to some concrete information on the subject.

The Court: No, I will of my own motion, sustain an objection to that.

Exception by defendant.

Q. Will you state Mr. Miller, what were the political affiliations of Mr. May?

Mr. Wertz: I object.

The Court: The objection will be sustained unless you make your question in the form I indicated a moment ago.

Mr. Sharts: Exception.

Q. State whether or not Mr. May was — the principal political party in the District opposed to that to which you yourself belong.

Mr. Wertz: I object. Did you say the principal or a principal?

The Court: I think that is drawn most too fine a sight. The question may be answered in that form.

A. He is.

Q. State whether or not he was a member of the same political party with Mr. Sullivan.

Mr. Wertz: I object.

The Court: The objection will be sustained.

Mr. Sharts: Enter an exception for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic Party and that Mr. Miller is a member of the Republican Party, and that the Socialist Party is without representation on the jury board. This is the ground of exceptions in the previous questions.

381 17. The Trial Court erred in refusing defendants to show that the names of the grand and petit jurors were chosen from the names of partisans of the Republican and Democratic Parties, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used.

Mr. Wertz: I object.

The Court: I do not think that is a material line of inquiry, Mr. Sharts.

Mr. Sharts: Enter an exception because we expect to show by this witness that he has made use of the files of the Board of Elections and has drawn therefrom names of partisans of the Republican and Democratic Parties and excluded the names of adherents of the Socialist Party.

The Court: In view of that tender of proof, I will reverse the ruling and permit the question to be answered.

(Question read.)

A. I obtained the names by writing to the Common Pleas Judges of this Division for various Counties, and asking them to send me a list of men in their counties qualified to serve as jurors.

Q. Were the Common Pleas Judges to whom you sent this request, members of any political party?

Mr. Wertz: I object.

A. I should say—

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception, because we expect to show that the Common Pleas Judges to whom this witness applied for names, were all of them members of the Republican and Democratic Parties, and not of the Socialist Party.

382 18. The Court erred in refusing to permit B. C. Miller, to answer in what manner the list of names sent in by Common Pleas Judges, as testified to by him, were selected, as is evident from the following testimony:—

Q. Do you know in what manner the list of names that were sent to you from the Common Pleas Judges as you have described, have been selected?

A. Not in detail. Most of the Judges—

Mr. Wertz: I object to that question; it would be hearsay.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception.

19. The Court erred in refusing the Clerk to answer a question that would show the proportions of names put in the jury box by Jeremiah J. Sullivan as is evident from the following testimony:—

Q. I will ask you to go through the card index, if you can, and give us a rough estimate of the proportion of names that are now in the jury box that were placed there by Mr. Sullivan?

A. I can do so.

The Court: I will sustain an objection to that part of it. I think when I have permitted you to establish that there were names there, I have given you the benefit of all that you are entitled to.

Mr. Sharts: Just enter an exception, on the ground that we expect to show by the proportion of names that a considerable number of names in the jury box now and at the time of the drawing and the Order of the Court were names placed there by Mr. Sullivan, and that such names are disqualified and that the remaining names did not constitute the required three hundred.

383 20. The Trial Court erred in refusing to permit an answer by B. C. Miller, Clerk, that would tend to establish the polit-

political affiliation of the Marshal of the Court, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. Now, Mr. Miller, who is the Marshal of the Court?

A. Charles W. Lapp.

Q. And of what political affiliation?

The Court: I will sustain an objection to that.

Mr. Sharts: Enter an exception on the ground that by the sixth challenge we have charged that the Marshal and his Deputy, who served the writs of venire for both of said juries, were not "indifferent persons," but active adherents of the Democratic Party and political adversaries of the defendants, said Marshal being an active member of the Democratic Club of Cleveland, and president of the City Counsel, and we expect to show by this line of questions that he was a political adversary of these defendants, at the time he served the writs of venire.

21. The Trial Court erred in refusing to sustain the defendants' motion to quash on the ground that one D. E. Grager was a member of said grand jury without his name having been drawn from said jury box and without any one of such names having been selected or summoned.

22. The Trial Court erred in overruling said motion to quash on the ground that the said grand jury presented this indictment without defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

384 23. The Trial Court erred in overruling said motion to quash on the ground that endorsements, not provided by law, and prejudicial to defendants, were placed on the back of said indictment, to-wit, the signature of the District Attorney beneath the signature of the foreman of the grand jury.

24. The Trial Court erred in overruling said motion on the ground that the indictment failed to show that the events constituting the alleged offense occurred before the sitting of said grand jury and before the finding of said indictment.

25. The Trial Court erred in overruling said motion on the ground that the indictment fails to show that the grand jurors were of the necessary qualifications, were of the body and the State and District, and sitting within the District, or of the jurors who found the indictment.

26. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said Alphons J. Schue was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen, at the time said offense is alleged to have been committed.

27. The Trial Court erred in overruling said motion on the ground that said indictment fails to state that said proclamation

had been published at the time said offense is alleged to have been committed, by these defendants, or was ever published.

28. The Trial Court erred in overruling said motion on the ground that said indictment fails to negative the possible appointments provided in Subdivision Third, of Section 1 of the Draft Act.

29. The Trial Court erred in overruling said motion on 385 the ground that said indictment alleges three separate offenses in one count.

30. The Trial Court erred in overruling said motion on the ground that said indictment fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce and procure said Schue to commit the alleged offense, and fails entirely to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet, so as to enable them to plead former acquittal or conviction.

31. The Trial Court erred in overruling said motion on the ground that these defendants are charged therein as accessories to a misdemeanor.

32. The Trial Court erred in refusing to permit the filing of defendants' plea in abatement and refusing to hear the several grounds set forth therein, as is evident from the following testimony:—

The Court: Upon examining this plea in abatement, I perceive that it raises no questions which were not raised by the challenge to the array which was tried by the Court, and, on evidence presented, held not to be sufficient. If I am wrong, that is giving you one ground of error.

Mr. Kavanagh: Mr. Sharts says except as to the 15th ground.

The Court: I would not permit under any circumstances to be offered in support of the 15th allegation, nor proof to the contrary. There would be no way of disproving that except by violating the secrecy of the grand jury room. I was going to say that, if I am wrong, I have given you one ground of error, for which you announced you were looking.

386 Mr. Sharts: In what form are you refusing it?

The Court: I am going to refuse it on the objection to its filing. I am not going to permit it to be filed, and thereby give you the benefit of an additional proposed ground of error.

Mr. Kavanaugh: If your Honor please, will you state for the benefit of the record, that there were two objections made by the Government: first, as to the right to file it after having filed the other pleadings, and second—

The Court: I would sustain it upon three grounds, if you wish. First, because it is tendered for the first time at too late a day. Second, because it is tendered after the Court had heard and tried a challenge to the array, both of the grand and petit juries, and this involves, so far as it is sufficient at all, the same grounds. Third, I sustain it on the ground that it is not sufficient in law as a plea in abatement. You may have your exceptions.

Mr. Sharts: Enter the exceptions for the defendants to the ruling of the Court.

33. The Trial Court erred in refusing to hear the several grounds set forth therein, viz.:

(a) That the names placed in the jury box from which these juries were drawn had been selected and put there by jury commissioners appointed on partisan consideration and from only the Democratic and Republican Parties, and without any representative of the Socialist Party; that said jury commissioners were hostile to these defendants;

(b) That all the names so selected and put in the jury box were the names of adherents of the Republican and Democratic Parties exclusively and that the names of members of the Socialist Party had been excluded from said box because of their political affiliation;

387 (c) That the names so selected and put in said jury box had been taken exclusively, or almost exclusively, from the names of land-owners, *a* property owners, capitalists and employers, and the names drawn from said box for these juries were the names exclusively of land-owners, property-owners, capitalists and employers, who by reason of their private interests were hostile to and prejudiced against these defendants;

(d) That said juries had been selected and drawn from only a part of the Northern District of Ohio, instead of the entire District;

(e) That the jury box had not been emptied at any time within recent years nor re-filled since November, 1916, many months before said drawings, and said box did not at the time of said drawing, contain the names of 300 qualified persons; that many of the names therein had been selected and put there by one Jeremiah J. Sullivan, whose authority as jury commissioner ended long before said drawings; that three of the persons on said grand jury had been so selected by Sullivan and 3 on the petit jury.

(f) That the Clerk of the Court, in the presence of the Marshal, both being political adversaries of these defendants and opposed to and prejudiced against them had selected from the box the names for jury service, and said names had been selected exclusively from adherents of the Republican and Democratic Parties who were likely to be and in fact were hostile to and prejudiced against these defendants; in violation of defendants' constitutional right of due process of law and trial by an impartial jury;

(g) That said Marshal and his Deputy, who served the 388 writs of venire for both of said juries were not "indifferent persons," but active partisans of the Democratic Party and political adversaries of these defendants;

(h) That said Marshal did not summon the 30 men for grand jury service as ordered by the Court and drawn by the Clerk, but selected and summoned only nineteen (19) thereof;

(i) That all persons summoned for said grand and petit juries were summoned by mail, including several residents of Cleveland, Ohio;

(j) That one D. E. Grager was sworn as a grand juror, no such

name having been drawn from the jury box, nor any one of that name summoned;

(k) That the Clerk in drawing the said grand jury, drew six from Cuyahoga County alone and none from seven of the Counties; and in drawing the petit jury, said Clerk, without any order of the Court, directing such selection, drew five from Cuyahoga, four from Columbiana, and three from Ashtabula, but none from eight Counties, in violation of Sec. 277 Judicial Code, and the constitutional right of defendants to an impartial jury of the State and District.

(l) That said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case;

(m) That said grand jurors were not of the necessary qualifications were not of the body of the State and District, nor properly constituted a grand jury.

34. The Trial Court erred in overruling a demurrer on the ground that the facts set forth therein do not constitute an offense against the laws of the United States.

35. The Trial Court erred in overruling said demurrer on the ground that the indictment charges these defendants with being accessories to a misdemeanor;

36. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege the events or acts as occurring prior to the finding of the indictment.

37. The Trial Court erred in overruling said demurrer on the ground that the indictment does not allege that it was presented by a grand jury, "duly impaneled and sworn," and in, of and for the District.

38. The Trial Court erred in overruling the demurrer on the ground that the Act of May 18th, 1917, *nor after* the Draft Act, and the Proclamation of said date, *their* unconstitutionality on the following grounds:

(a) Said Act creates Involuntary Servitude in violation of Amendment XIII of the United States Constitution;

(b) Said Act deprives men of their liberty without due process of law in violation of Amendment V of the United States Constitution;

(c) Said Act deprives men of their right of trial by jury in violation of Amendment VI of the United States Constitution;

(d) Said Act violates Article 1 Section 8 Clause 15 of the United States Constitution;

(e) Said Act violates Article 1, Section 8, Clause 16 of the United States Constitution;

(f) Said Act in Section IV thereof, violates Article 3, Section 1 and Article 1, Section 8, Clause 9, of the United States Constitution.

(g) Said Act violates Article II, Section 2 of the United States Constitution;

390 (h) Said Act violates Article 10 of the amendments of the United States Constitution;

(i) Said Act in Section 6 thereof violates the fundamental principle of justice and liberty embodied in the Preamble of the United States Constitution.

39. The Trial Court erred in refusing to grant to these defendants separate trials, because under the circumstances it was impossible to introduce evidence as to one of the defendants without thereby prejudicing all as members of said political organization, which refusal of the Court, is evident from the following testimony:

The Court: The motion for separate trials will be denied and you may have your exceptions.

Mr. Sharts: Enter the exception of the defendants.

40. The Trial Court erred in refusing a challenge for cause by defendants of a juror, Charles P. Smith, as is evident from the following testimony:

Mr. Sharts: Then let me put my question in this form: suppose it should develop that these men have made a very ardent and vehement attack upon the law, criticising the law and criticising the President and the Government in their public meetings, but have advised their hearers to register in spite of the evil features of the law, as they see it, but it should develop that a young man listening to them has been induced thereby to refuse to register, would that affect your view as to the probable guilt or innocence, that circumstance, that they were urging their protest against the Draft Act?

Mr. Breitenstein: I object to the form of the question.

The Court: I will let him answer that question.

A. I think it would influence me against them.

Mr. Sharts: I would like to challenge the juror for cause, if Your Honor please.

391 The Court: I will get a little further information. Mr. Smith, have you formed in your own mind any opinion as to the guilt or innocence of the parties defendant in this case.

The Juror: No, sir.

The Court: Have you any personal familiarity, by hearsay or otherwise, with the alleged offense charged against them and the circumstances under which it was committed?

The Juror: Not much of one. I read some in the paper at the time this took place, something of that.

The Court: Do you remember now distinctly the circumstances and details which you read?

The Juror: No, sir.

The Court: Are you conscious of any bias or prejudice against these defendants or either of them which would influence or control your judgment and opinion as to their guilt or innocence according to the evidence as it may be produced before you and the law as it may be given to you by the Court?

The Juror: No, sir.

The Court: I repeat to you again: Can you, in your opinion, serve upon this jury and render a verdict of guilty or not guilty according to the evidence as it may be presented and the law as I shall give it to you?

The Juror: Yes, sir.

The Court: I will overrule your challenge for cause.

Mr. Sharts: Enter our exception.

41. The Trial Court erred in refusing the members of the jury to answer the following questions as is evident from the following testimony:

Mr. Sharts: Is there any man here that does not know the distinction between the Socialists and the Anarchists?

392 Mr. Wertz: I object.

The Court: That is not a proper question.

Mr. Sharts: Is there any man here that does not know there is a very wide distinction between Socialists and Anarchists?

Mr. Wertz: I object to that.

The Court: I will sustain the objection to that question. I am not going into a discussion of that question.

Mr. Sharts: Enter the exception of the defendants to the ruling of the Court.

42. The Trial Court erred in overruling defendants' challenge to the petit jury array, made after examination, on the ground that the defendants had been misled as to what jury would try the case, and that said panel had been drawn before the grand jury which brought in the indictment, as is evident from the following testimony:

Mr. Sharts: At this point, If Your Honor please, I have not had the opportunity to look the point up and I do not know whether it has any merit at all, but I would like to interpose a challenge to the entire array before proceeding further, on the ground that we were certainly mislead, not intentionally, by the drawing of the petit jury by the order of the Court, following the drawing of the grand jury, in that we assumed that the petit jury which would try the case, was the petit jury drawn following the drawing of the grand jury, and we spend considerable time and money looking up the antecedents of the men to sit on the petit jury, and we are now confronted with a petit jury who are strangers to us entirely. It places us at some disadvantage and while I doubt if we have a legal right to object to that method of placing a petit jury before us, I would like to interpose a challenge on that ground.

393 The Court: The drawing was made of additional jurors for this term and the order was made in that form, and, inasmuch as the Court has allowed you wide latitude to inquire as to the qualification or disqualification of the jurymen tendered and there is not disclosed a shadow of objection as to any of the jurymen offered you, I shall overrule the challenge.

Mr. Sharts: Enter the exception of the defendants.

43. The Court erred in allowing an improper announcement prejudicial to defendants, in the Clerk's administering the oath to the jury as appears from the following testimony:

The Court: The Clerk will swear the jury.

The Clerk: You and each of you do solemnly swear that you will well and truly try the issue joined in this case wherein the United States of America by indictment prosecutes Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker for violation of the Act of May 18th, 1917, and a just and true verdict render therein according to the testimony and the law——

The Court: Just a moment. I did not understand that Mr. Schue was on trial in this case.

Mr. Wertz: He plead guilty.

The Court: Then is that a proper form of oath?

The Court: All right.

The Clerk: —and a just and true verdict render therein according to the testimony and the law as it shall be given you by the Court, so help you God.

Mr. Sharts: I would like to interpose an exception to the form in which the announcement was made and the form of the oath. I mean the announcement regarding Mr. Schue, in the presence of the jury.

Mr. Wertz: We can produce the record.

The Court: You may have your exception.

394 44. The Trial Court erred in admitting, as against the defendants, over their objection and exception, certain testimony of the witness, Alphons J. Schue, in substance as follows:

Q. When did you first learn of the conscription law or the registration law?

A. I read about the law in the paper.

Q. Now, up to the 20th of May, 1917, what was your intention about registering or not registering under that law?

Mr. Sharts: I object. If your Honor please, the Act under which this indictment is drawn was passed on a certain date (May 18th) and anything that occurred or any intention or anything of that sort that may have been in existence prior to that time, I think, is incompetent in this case.

The Court: I am inclined to agree with you about that subject to certain restrictions, but the question is not open to objection on that ground.

Q. On the 20th of May, and prior thereto, what was his intent and purpose with respect to the registration provisions of that law?

The objection would be overruled. Exception by defendant.

A. I would have certainly registered, if I had not heard about these Socialist Peace Meetings.

45. The Trial Court erred in admitting the said testimony as against defendants, Ruthenberg and Wagenknecht.

46. The Trial Court erred in admitting testimony over the objection and exception of defendants, as against the defendants, Ruthenberg and Wagenknecht, regarding the speech of Charles Baker of May 20th, as is evident from the following testimony:

395 Q. Now, do you recall what Baker said on the 20th of May, 1917, in substance, Mr. Schue, in that speech?

A. He said he is of military age and he would refuse to register.

Q. What else did he say that you can recall?

A. And he told about the standpoint of the Socialist Party, the way they voted against conscription and that it was taken by the Local here that all Socialists would refuse to register.

Q. What is the last part of the answer?

A. That all Socialists would refuse to register and induce others, telling them that they would have the support of the Socialist Party.

Q. Do you recall anything else that Baker said on that date? If you do not recall anything else, in order to refresh your memory, I will ask you if you recall if he said anything about himself registering personally?

Mr. Sharts: I object to putting a suggestion like that in a question.

The Court: I understood you to say, Mr. Schue, that what you have testified to was in substance what you remember as to Mr. Baker's speech on the 20th of May, at the Public Square. Is that correct?

The Witness: Yes, sir.

The Court: You may put the question, Mr. Wertz.

Exception by defendant.

The Witness: He said he would refuse to register, he being of military age.

Q. Do you know whether or not, he did, in fact, register?

396 Mr. Sharts: I object.

The Court: The objection to that will be sustained.

Q. In order to refresh your memory, I will ask whether you remember Baker saying anything about him being shot before he would register?

Mr. Sharts: I object to leading the witness to an answer like that.

The Court: You may indicate to him, Mr. District Attorney anything in addition to what has already been said what Mr. Baker said on the subject with reference to being shot before registering.

Exception by defendant.

A. He said he would rather be shot here as a man than in the trenches of Europe as a dog.

47. The Trial Court erred in admitting evidence of the speeches of Wagenknecht and Ruthenberg on May 27th as against Baker, and in overruling the motion for a new trial based on that point.

48. The Trial Court erred in refusing the request of defendants, that the testimony of James L. Lind, as follows, be stricken out:

(By Mr. Sharts:)

Q. This statement that you refer to, was it at the police station?

A. Yes, in the Police Inspector's Office.

Q. Was Mr. Schue present?

A. I don't think so. I don't know Mr. Schue.

Mr. Sharts: If Your Honor please, I am going to ask to have the testimony of this witness, with regard to any admissions made by Mr. Wagenknecht, at the police station, stricken out, as not having been made in the presence of Mr. Schue.

397 The Court: I will overrule your request and you may have your exception, but I will make this statement in addition to that.

Mr. Sharts: We will take an exception.

The Court: The jury will not regard any testimony made by this witness as to what transpired at the police station except as it was and was intended to be a repetition of that which had taken place or transpired on the Public Square. Any part of the testimony that is of a different character than that will be disregarded by you.

49. The Trial Court erred in admitting the introduction of evidence by Wilbur D. Bacon, and permitting the introduction of a leaflet purporting to have been approved at a meeting attended by the said Wilbur D. Bacon, on May 13th, 1917, and at which meeting defendants, Ruthenberg and Wagenknecht were present, on the ground that the said leaflet was alleged to have been approved by some of defendants on May 13th or five days prior to the passage of the Act, as appears from the following testimony:

(By Mr. Wertz:)

Q. Were you present at a meeting some time in May at which Ruthenberg and Wagenknecht were present?

A. Yes, sir.

Q. Do you recall the time of that meeting, the date?

A. It was on or about the 13th day of May.

Mr. Sharts: I object to any further examination on that line.

The Court: What have you to say?

Mr. Wertz: I want to inquire about this resolution. (Handing paper to the Court.)

The Court: Have you seen it?

Mr. Sharts: No.

The Court: Mr. District Attorney, before I rule on it, I think Counsel should see it.

398 Mr. Wertz: Yes.

The Court: The resolution at the bottom is what he is inquiring about.

Mr. Sharts: I will interpose my objection to the introduction of any such leaflet unless it be first established that it was used after the enactment of the law.

The Court: I will say to the jury, and I will say to them now, that no conviction of these defendants or either one of them can be predicated upon any act which was done and performed by them prior to the 18th of May, 1917, but it is in evidence here from one of the witnesses who has testified that after the 18th day of May, 1917, some one or the other of these speakers referred to the action taken by the local organization of the party that they were undertaking to represent and proclaimed in a way *that* that action had been, and you will recall the other testimony, which seems to me makes this evidence competent, if for no other reason than as bearing upon the motive and intent and as characterizing the conduct and attitude of these three defendants on the 20th and 27th of May. I am not undertaking to say what would be. The competency of this witness to testify with respect to any resolution or any action taken or that would bind either of these defendants as participants in the adoption of it or assent thereto has not been disclosed, but this statement will indicate in a general way what my ruling will be as questions arise, so that you may take your exceptions now or interpose them from time to time.

Mr. Sharts: I will take our exception now to the ruling of the Court, and, if Your Honor please, I would like to call your attention further, for the protection of the defendants in this matter, to the fact that we are, I believe, limited strictly to what was brought 399 to the attention of Mr. Schue. Any activities by the association, either before or after May 18th, if those activities were not brought to the attention of Mr. Schue, cannot be introduced in this case.

The Court: I concur entirely in that position. I shall rule and charge in accordance with it, but the testimony here as to what was said and done by these defendants on the 20th and 27th of May in the presence of Mr. Schue makes competent, if it should appear that these defendants were participants in the adoption of any resolution of this character, the evidence of the fact as characterizing their motive and intent and as bearing upon the primary charge here as to whether they aided and counseled Schue wilfully and as to the intent with which their acts were done and performed which have been testified to. That will be the line of ruling. You may have your exception.

Mr. Sharts: I will take my exception to that and ask Your Honor whether it is necessary to raise the question now as to the form of this resolution in the leaflet as it is offered here?

The Court: We will see about that when we get to it. He has not proved any resolution was adopted and he has not proved the con-

tents of it nor that these defendants were involved in it. I will rule on your objections as we progress.

Q. Do you recall who presided over the meeting?

A. Mr. C. E. Ruthenberg presided.

Q. Is that the gentleman sitting at the table here? (Indicating defendant Ruthenberg.)

A. It is.

Mr. Sharts: Enter an exception.

The Court: The objection will be overruled.

Q. Did you see Mr. Wagenknecht at that meeting?

A. Yes, sir.

400 Q. Mr. Sharts: Enter our objection, and I will ask the witness to wait always until I enter the exception.

The Court: Mr. Stenographer, you will note an objection and exception to each one of these questions and answers, even though Mr. Sharts does not specially mention it and I do not specially rule.

Q. Do you recall whether or not Mr. Baker was present?

(Objection by defendant; overruled; exception.)

A. I do not recall if he was present or not. I did not see him.

Q. Do you recall the presentation at that meeting of a resolution in regard to the registration under the Conscription Act?

(Objection by defendant; overruled; exception.)

Q. I hand you a paper marked "Government's Exhibit No. 1" and ask you to examine it and see if you recognize what that is?

(Objection by defendant; overruled; exception.)

A. That is the resolution passed at the meeting at the Socialist Hall.

Mr. Wertz: I do not know whether the Court and jury heard the answer or not.

Mr. Sharts: I object to the presenting of that clipping. There has been no connection shown between Mr. Schue and any meeting at that time, of the reading of that resolution to Mr. Schue or any definite explanation of that resolution to Mr. Schue.

The Court: I think it would perhaps be prejudicial to your clients if I were to summarize the testimony, as I recall it, of Mr. Schue as to what was said by these defendants in the meetings on the 20th and 27th of May. For the purpose of bearing upon the intent with which the acts were said and done which have been

401 testified to by Mr. Schue as having taken place in the presence and in his hearing, I will admit the copy of the resolution referred to. I will say this much, that Mr. Schue distinctly testified that it was stated by these speakers as to what had been the attitude of the National Socialist Party in their convention at St. Louis. It was further testified by Mr. Schue that it was stated by these speak-

ers that the local organization of the Socialist Party of which they claimed to be representatives had taken some action, but without going further you will remember the rest of the testimony bearing upon that subject. Under the circumstances, as characterizing and bearing upon the intent which it is necessary here for the government to prove, I regard the resolution as competent evidence.

Mr. Sharts: Before he introduces it I want to call Your Honor's attention further to an omission. How has he identified the resolution referred to in any particular speech that Mr. Schue heard with this particular resolution. If your Honor please, I ask that they introduce first the resolution of the National Socialist Party that they say the speakers on May 20th in the hearing of Mr. Schue referred to and said that the Socialist Party of Cleveland had taken similar action with regard thereto. There is no evidence before the Court at present that this is the resolution in accordance with the resolution of the National Convention of the Socialist Party.

The Court: I will overrule your objection.

Mr. Sharts: Enter our exception.

50. The Trial Court erred in not permitting Counsel to show how many more resolutions were passed at a certain meeting, at which some of defendants were present, as it is evident from the following testimony:

402 (By Mr. Sharts:)

Q. Will the Court permit me to question the witness on a few points?

The Court: That you think goes to the competency of the testimony now offered?

Mr. Sharts: Simply as to his knowledge of how many resolutions were passed and with reference to what.

The Court: That does not go to the competency of the testimony now offered. It might go to his credibility or to his memory or to other matters which are collateral but not to the competency of what is being offered. No, not for that purpose.

Mr. Sharts: Enter our exceptions.

51. The Trial Court erred in permitting testimony of Farasey, of statements made by Wagenknecht in the absence of Schue, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. I will hand you a transcript here and ask you whether you made that transcript from the original notes and whether or not it is a correct transcript?

A. Yes, all of that and I read that over.

Q. I will ask you to read the conversation that took place between Wagenknecht, Mr. DeWoody and yourself and Mr. Lind at the police station, following his arrest?

Mr. Sharts: If Your Honor please, I want to enter my objection at this time. Mr. Schue is charged as the principal who refused to

register, and the statements that have been made here by the reading of those notes are the only statements that were made or that could possibly have been made in the hearing of Mr. Schue. Any further statements cannot be added on top of and in addition to what has been presented as a complete record of the statements made by Mr. Wagenknecht.

403 The Court: You do not object to the use of the transcript because he has not produced the notes here from which he says he has transcribed it?

Mr. Sharts: I understood that he was reading from his original notes at the first.

The Court: He did at the first. Now, on the conversation at the jail, he says that he does not have his original notes here but he has the transcript of them which he himself made and says it is a correct transcript. If you insist that he shall send for his original notes and have them here for your examination, if you wish to examine them before he reads the transcript or reads from it, I would rule you are entitled to that.

52. The Trial Court erred in permitting the witness Farasey to testify as to part of his notes to the prejudice of defendants as is evident from the following testimony:—

The Court: What has become of that part of your notes?

The Witness: I cannot tell you.

The Court: Have you searched in every place where they probably would be?

The Witness: Hastily, yes.

The Court: Have you any reason to believe that a further search would produce them?

The Witness: No, I have not.

The Court: Did you make a transcript of them before you lost or destroyed part of your notes?

The Witness: Yes, sir.

The Court: Were those notes correctly taken at the time?

The Witness: Yes, sir, to the best of my ability.

The Court: What as to the transcript that was made from that part of your notes which are missing, was that correctly made?

404 The Witness: That was correctly made.

The Court: Have you seen the transcript?

The Witness: Yes, sir.

The Court: How long after the incident was it that you made the transcript?

The Witness: I just had time to have supper, about an hour or an hour and a half.

The Court: With that preliminary examination, I will rule that he may use part of his notes that he has here and the transcript made under those circumstances for the part of it as to which he cannot produce his notes.

Mr. Sharts: Enter our exception.

53. The Trial Court erred in admitting all of the testimony of the stenographer to the prejudice of the defendants, as is evident from the following testimony:

The Court: Have you anything more, Mr. District Attorney, so far as you would now know?

Mr. Wertz: We rest.

The Court: If you have anything more, we will receive it at nine o'clock tomorrow morning. The general denial tendered by the District Attorney this afternoon, I will permit to be filed in accordance with the leave that was asked and given yesterday, Mr. Sharts. I have had the stenographer transcribe what occurred. You may have an exception.

Mr. Sharts: Our exceptions are in. \* \* \*

54. The Trial Court erred in refusing to direct a verdict for the defendants or any one of them or two of them at the close of the Plaintiff's testimony, there having been no corroborative evidence offered to support the statements of defendant Schue, who was an alleged accomplice.

55. The Trial Court erred in declining the attempt of defendants to produce the constitution and by laws of the Socialist Party, to whom the limitation of rights and acts of defendants, as 405 officers and members of the Socialist Party, as is shown by the following testimony:—

(By Mr. Sharts:)

Q. You have spoken about a constitution and by-laws?

A. Yes, sir.

Q. I will ask you if that is the constitution and by-laws that you referred to? (Handing pamphlet to the witness.)

A. That is.

Q. Is the pledge in there the pledge that is taken by the members of the Socialist organization?

A. Yes.

Q. I wish you would read that pledge to the jury.

Mr. Wertz: If the Court please, I object.

The Court: Do you want to examine it before it is ruled on? (Pamphlet handed to Mr. Wertz.)

Mr. Wertz: I object.

The Court: I sustain the objection to it on the ground of immateriality and irrelevancy.

Mr. Sharts: Enter our exception.

55. The Trial Court erred in refusing to permit these defendants to rebut evidence of intent by producing evidence that they had constantly advised registration when inquired of, as is evident from the following testimony:—

(By Mr. Sharts:)

Q. You are within the registration age? Have you registered?

A. (Mr. John Fromholtz.) Yes, sir.

Q. I will ask you whether or not you consulted Mr. Ruthenberg regarding registration?

A. No.

Mr. Wertz: I object.

Q. What did you say "No"?

A. I have not asked Mr. Ruthenberg about registration.

406 The Court: I regard that as incompetent testimony but I will overrule the objection for the present as he says he did not consult him.

And as is evident from the following testimony:—

(By Mr. Sharts:)

Q. Have you been asked by any one what they should do in case of registration.

A. (By Charles Baker.) I have.

Q. By whom?

A. I was asked by three persons, members of the party from Lorain, Ohio, who came to Cleveland on Decoration Day and asked my advice, as the state organizer, what they shall do on the question of registration.

Mr. Wertz: I object.

Mr. Sharts: If Your Honor please, it seems to me that the testimony is admissible at least to show the motive and purpose and consistency of the speech that he has made, to show the attitude of the speaker with regard to registration, which has been questioned.

The Court: No, I will sustain the objection to that. The charge here is a specific charge that is confined to his acts and conduct on a specific occasion when he was listened to by some person and when it is alleged he caused that person to violate the law and thereby to make the defendant here a participant in it. That fact cannot be affected by proof as to what his attitude was on other and different occasions. I will sustain the objection.

Mr. Sharts: Enter the exception of the defendant.

56. The Trial Court erred in permitting the prosecution to ask Ruthenberg and in insisting that Ruthenberg answer, the questions of explanations to show, viz., how the young man of the Country

407 could be conscripted without first registering, when the witness did not urge conscription, as is evident from the following testimony:—

Q. Will you explain to the jury how in your mind it was *probable* to conscript the Socialist or the young man of the country without first registering, under this law?

Mr. Sharts: I object.

The Court: I think that is legitimate.

Mr. Sharts: If your Honor please, the point is this: He is asking him to explain how they could conscript them without registering. He has not urged their conscription.

The Court: I will overrule your objection, and on this ground: The witness has undertaken, every time that the word "registration" has appeared in any of the transcript of what he said upon that occasion, to say that he did not use the word "registration," but it was "conscription," undertaking to draw in his mind some distinction between opposing registration for conscription and upholding conscription. Now, as bearing upon his intent, and what he meant by his acts and words, I consider the District Attorney's question competent.

Mr. Sharts: Enter the exception of the defendants.

The Witness (Mr. Ruthenberg): I would gladly state, in reply to the question, that this difference existed in my mind: A man might submit to registration, he might voluntarily go and register his name as a man between the ages, go through that formality, which this Court itself, I believe, has said in its charge to the Grand Jury was a mere formality preceding the act—

The Court: No, I did not say anything like that.

The Witness: That is as I remember it. And he might submit to that and later, if he happened to be one of — victims who 408 was selected to go and shoot his fellow human beings, he might well, as tens of thousands of men in England have done, refused to be conscripted and to murder his fellow human beings. That is my position.

57. The Trial Court erred in not directing a verdict for the defendants at the close of all the testimony, for the same reason.

58. The Trial Court erred in overruling the motion of the defendants for a new trial for the reasons therein given, and particularly on the ground of newly discovered evidence, tending to show that Schue perjured himself on the witness stand in saying that he had had no connection with the Socialist organization other than to attend the meetings of May 20th and May 27th.

59. The Trial Court erred in overruling the motion in arrest of judgment for the reasons therein given, wherefore the defendants, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, each for himself and jointly, pray that the judgment and sentence herein may be reversed and held for naught.

CHARLES E. RUTHENBERG,  
ALFRED WAGENKNECHT,  
CHARLES BAKER,  
By MORRIS H. WOLF,  
JOS. W. SHARTS,  
*Attorneys for Defendants.*

409

*Order of Severance.*

(Ent. July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

ALPHONS J. SCHUE, CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

This matter coming before the Court on the application of Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, parties defendant, for a Writ of Error; and Alphons J. Schue, party defendant, being present in person and by counsel, and the said Alphons J. Schue, having declined to join in said application or prosecute error, it is hereby considered by the court that an Order of Severance be allowed, and the same is hereby allowed, granting to the said Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker the right to prosecute said proceedings in error independently of the said Alphons J. Schue.

410

*Order Allowing Writ of Error.*

(Ent. July 25, 1917, by Judge Westenhaver.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

This 25th day of July, 1917, came Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, by their attorneys, and each for himself and jointly, filed and presented to this court their petition, praying for an allowance of a writ of error and assignment of errors to be urged by them; praying also that a transcript of the record, proceedings, papers and exhibits upon which the judgment and sentence herein were rendered, duly authenticated, be sent to the Supreme Court of the United States, and that such other and further proceedings may be had, as may be proper in the premises.

On consideration whereof the court does allow the Writ of Error, and orders that said Writ of Error shall operate as a supersedeas, and that said court has fixed a supersedeas and bail bond on behalf of each of said defendants in the sum of \$5,000.00 *Dollars*, the said bond to be approved by the clerk.

411

*Writ of Error.*

The Supreme Court of the United States of America.

U. S. District Court for the Northern District of Ohio, Eastern Division.

No. 3873.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The United States of America as plaintiff and Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, defendants, said case being No. 3873 on the Docket of the U. S. District Court for the Northern District of Ohio, Eastern Division, a manifest error hath happened, to the great damage of the said Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, and each of them, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgement be therein given, that then and under your seal, distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington in the District of Columbia on the — day of — next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice  
412 of the United States the 25<sup>th</sup> day of July, in the year of  
our Lord one thousand nine hundred and seventeen, and  
of the Independence of the United States of America the one hundred and forty-first.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER,  
*Clerk of the District Court of the United States  
for the Northern District of Ohio.*

Allowed by

D. C. WESTHAVER, *Judge.*

July 25, 1917.

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\*Not exceeding — days from the day of signing the citation.

413 [Endorsed:] In the District Court of the United States for the Northern District of Ohio, Eastern Division. No. 3873.

The United States of America, Plaintiff, vs. Alphons J. Schue, Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker, Defendants.

Writ of Error. Filed Jul. 25, 1917, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

Morris H. Wolf, Cleveland, O., Joseph W. Sharts, Dayton, O., Attorneys for Defendants.

*Return on Writ of Error.*

UNITED STATES OF AMERICA,  
*Northern District of Ohio, ss:*

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court, a full, true and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the preceipe filed, to the Supreme Court of the United States.

There is annexed hereto and made part of this return the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said District, this 21st day of August, A. D. 1917, and in the 142nd year of the independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*  
By F. J. DENZLER,  
*Deputy Clerk.*

Filed Aug. 21, 1917, at — o'clock — M. B. C. Miller, Clerk U. S. District Court, N. D. O.

U. S. District Court for the Northern District of Ohio, Eastern Division.

No. 3873.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at

the City of Washington, in the District of Columbia, on the \*20 day of August, next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein Charles E. Ruthenberg, Alfred Wagenknecht and Charles Baker are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiffs in error, and each of them, as in said petition for a Writ of Error mentioned and said Assignment of Error filed with said petition for a Writ of Error, should not be corrected, and why speedy justice for the parties in that behalf should not be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 25<sup>th</sup> day of July, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America, the one hundred and forty-first.

D. C. WESTENHAVER,  
*Judge of the District Court.*

\*Not exceeding — days from day of signing.

Service of the above citation is hereby acknowledged and the appearance of the United States of America is hereby entered.

\_\_\_\_\_,  
*U. S. Attorney.*

415 [Endorsed:] U. S. Marshal's No. —. In the District Court of the United States for the Northern District of Ohio, Eastern Division. No. 3873.

The United States of America, Plaintiff, vs. Charles E. Ruthenberg, Alphons J. Schue, Alfred Wagenknecht, and Charles Baker, Defendants.

Citation. Filed Jul. 27, 1917 at — o'clock — M. B. C. Miller, Clerk, U. S. District Court, N. D. O.

Morris H. Wolf, Cleveland, O., Joseph W. Sharts, Dayton, O., Attorneys for Defendants.

*U. S. Marshal's Return.*

THE UNITED STATES OF AMERICA,  
*Northern District of Ohio, ss:*

Received this writ at Cleveland, O., July 27, 1917, and on the same day at the same place, I served it on the within named The United States of America, by delivering to Jos. C. Breitenstein, Asst. U. S. Atty. for the said The United States of America, and for the Northern District of Ohio, at Cleveland, O., personally, a true and certified copy hereof, with all endorsements thereon.

CHAS. W. LAPP,  
*U. S. Marshal,*  
By T. E. WALSH, *Deputy.*

*Marshal's Fees.*

Service Spa. ....	\$2.00
Travel Spa. ....	.60
	_____
	\$2.06

416 *Application for Withdrawal of Exhibits.*

(Filed August 20, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, and CHARLES BAKER, Defendant.

*Application for Withdrawal of Exhibits.*

Now come defendants in the above entitled action, by their attorneys, and respectfully ask the Court that they be permitted to withdraw the exhibits offered by the Government in the above action, and which exhibits are now attached to the bill of exceptions, for the reason that the said exhibits must be attached to a record certified to the Supreme Court of the United States.

MORRIS H. WOLF,  
JOS. W. SHARTS,  
*Attorneys for Defendants.*

417 *Order for the Withdrawing of Exhibits.*

(Entered August 20, 1917.)

No. 3873. Criminal.

THE UNITED STATES OF AMERICA

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER.

On application of defendants for permission to withdraw exhibits for the purpose of attaching them to a record to be certified to the Supreme Court of the United States, it is hereby ordered by the Court that all of said exhibits offered and introduced on behalf of

the plaintiff, and defendants, be withdrawn from the files of this Court, and forwarded to the Clerk of the Supreme Court of the United States, for use at the hearing of this cause in the said Supreme Court of the United States.

418 *Precipe for Transcript.*

(Filed August 4, 1917.)

In the District Court of the United States for the Northern District of Ohio, Eastern Division.

No. 3873. Criminal.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT and CHARLES BAKER, Defendants.

*Precipe for Transcript.*

To the Honorable Clerk:

Please prepare transcript of record in the above entitled cause, and include therein the following papers:

Indictment.

Challenge to the Array.

Motion to Quash.

Plea in abatement.

Demurrer.

Answer of United States to Challenge to Array.

Order overruling challenge to the array, motion to quash, plea in abatement and demurrer.

Amended challenge to the array.

Orders on trial, verdict, etc.

Motion for a new trial.

Motion in arrest of judgment.

Order overruling motion for a new trial, and motion in arrest of judgment.

Order approving narrative form of testimony.

Narrative form of testimony.

Petition for writ of error.

Assignment of errors.

Amended assignment of errors.

Order allowing writ of error.

Writ of error.

Citation.

Order of Severance.

Motion and Order withdrawing exhibits.

This Precipe.

Please deliver all papers to the Clerk of the Supreme Court of the United States, at Washington, D. C.

Serve copy of Precipe on Attorneys for Government by Marshal.

CHARLES E. RUTHENBERG,  
ALFRED WAGENKNECHT,  
CHARLES BAKER,  
By MORRIS H. WOLF,  
JOS. W. SHARTS,  
*Attorneys for Defendant.*

419

(Endorsement.)

THE UNITED STATES OF AMERICA,  
*Northern District of Ohio, ss:*

*U. S. Marshal's Return.*

Received this writ at Cleveland, O. August 4th, 1917, and on the same day and at the same place I served the within attorneys for the Government, by delivering to Joe. C. Breitenstein as the Asst. U. S. District Attorney for the said Government for the Northern District of Ohio, at Cleveland, O., personally a true and certified copy hereof with all endorsements thereon.

Marshal's Fees .....	\$2.00
Travel .....	.06
	<hr/>
	\$2.06

CHAS. W. LAPP,  
*U. S. Marshal.*

420

*Certificate of Clerk.*

NORTHERN DISTRICT OF OHIO, *ss:*

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the final record, including the bill of exceptions in narrative form, petition for writ of error, assignments of error and bond on writ of error, and all proceedings in said cause in accordance with the precipe for transcript filed by plaintiff in error, the originals of all which except certain exhibits withdrawn by leave of court are now in my custody as clerk of said court.

There is also annexed to and transmitted with such transcript of record, the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland in said district this — day of

August, A. D. 1917, and in the 142nd year of the independence of the United States of America.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, *Clerk,*  
By F. J. DENZLER,  
*Deputy Clerk.*

Endorsed on cover: File No. 26,123. N. Ohio D. C. U. S. Term No. 656. Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker, plaintiffs in error, vs. the United States of America. Filed August 30th, 1917. File No. 26,123.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHARLES E. RUTHENBERG, ALFRED WAGEN-  
knecht, and Charles Baker, plaintiffs in  
error, *v.* THE UNITED STATES OF AMERICA. } No. 656.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO.

JOSEPH F. ARVER, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 663.

ALFRED F. GRAHL, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 664.

OTTO WANGERIN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 665.

WALTER WANGERIN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES OF AMERICA. } No. 666.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MINNESOTA.

LOUIS KRAMER AND MORRIS BECKER, plaintiffs in error, <i>v.</i> THE UNITED STATES.	No. 680.
THE UNITED STATES.	
LOUIS KRAMER, PLAINTIFF IN ERROR, <i>v.</i> THE UNITED STATES.	No. 681.
THE UNITED STATES.	
EMMA GOLDMAN AND ALEXANDER BERK- man, plaintiffs in error, <i>v.</i> THE UNITED STATES OF AMERICA.	No. 702.
THE UNITED STATES OF AMERICA.	

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

---

**MOTION BY THE UNITED STATES TO ADVANCE.**

Comes now the Solicitor General and respectfully moves the court to advance the above-entitled cases for joint hearing on a day convenient to the court.

These cases are commonly known as the "Selective Draft Law" cases.

No. 656 is a direct writ of error to the District Court of the United States for the Northern District of Ohio. Plaintiffs in error therein were convicted of aiding, abetting, counseling, commanding, inducing, and procuring one Alphons J. Schue to fail and refuse to appear and register himself as required by the so-called "Selective Draft Act" of May 18, 1917, and the proclamation of the President issued pursuant thereto on the same date, in violation of

section 332 of the Criminal Code. They were sentenced to imprisonment for one year in the Stark County Workhouse at Canton, Ohio. All are at large on bail.

Nos. 663 to 666, inclusive, are direct writs of error to the District Court of the United States for the District of Minnesota. Plaintiffs in error therein were convicted for failing to appear and register themselves, in violation of the act and the proclamation hereinbefore mentioned. They were sentenced, respectively, to imprisonment for one year in various jails specified in the respective judgments of the District Court. All are at large on bail.

No. 680 is a direct writ of error to the District Court of the United States for the Southern District of New York. Plaintiffs in error therein were convicted of a conspiracy to commit an offense against the United States, to wit, to aid, abet, counsel, command, and procure divers persons to fail to appear and register themselves as required by the act and proclamation hereinbefore mentioned, in violation of section 37 of the Criminal Code. Kramer was sentenced to imprisonment for a period of two years in the Federal penitentiary at Atlanta, and to pay a fine of \$10,000, and is now serving his sentence because of failure to furnish bail in the amount specified. Becker was sentenced to imprisonment for a period of one year and eight months in the same penitentiary, but was enlarged on bail.

No. 681 is a direct writ of error to the District Court of the United States for the Southern District

of New York. Plaintiff in error therein, who is also one of the plaintiffs in error in No. 680, was convicted for failing to appear and register himself, in violation of the act and proclamation hereinbefore mentioned. He was sentenced to imprisonment for a period of one year in the Mercer County Prison, New Jersey, the imprisonment to start at the expiration of his imprisonment in the penitentiary at Atlanta imposed under the indictment in No. 680.

No. 702 is a direct writ of error to the District Court of the United States for the Southern District of New York. Plaintiffs in error therein were convicted of a conspiracy to commit an offense against the United States, to wit, to aid, abet, counsel, command, and procure divers persons to fail to appear and register themselves as required by the act and proclamation hereinbefore mentioned, in violation of section 37 of the Criminal Code. Goldman was sentenced to imprisonment in the State Penitentiary of Jefferson City, Mo., for a period of two years and to pay a fine of \$10,000. Berkman was sentenced to imprisonment for a similar period in the Federal Penitentiary at Atlanta, Ga., and to pay a fine in the same amount. Both are at large on bail.

While the various records in these respective cases contain many assignments of error alleging certain errors to have been committed during the course of the trials, the principal proposition which the assignments of error in all of the cases assert is that the "Selective Draft Law" is unconstitutional.

If, because of the large number of cases, coming as they do from various districts in the United States and requiring the attention of a number of counsel on behalf of the various plaintiffs in error, the court deems it inadvisable to set the cases down for joint hearing, then it is requested that the cases be advanced and set down for hearing on the same date.

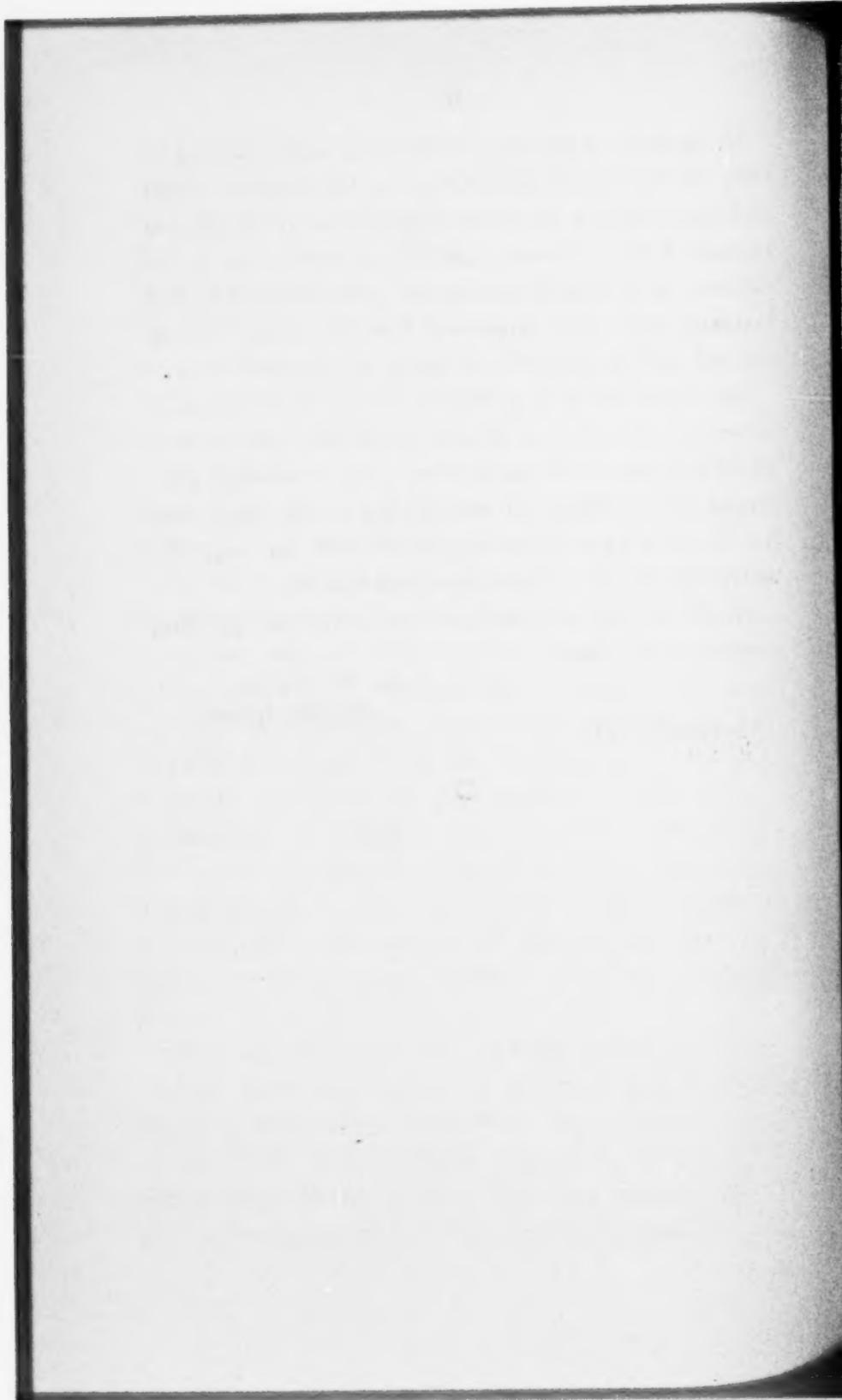
The cases are of importance to the Government in enforcing the criminal provisions of the law involved as well as in the administration of the provisions governing the drafting and assembling of the army, and for these reasons it is requested that the cases be advanced to the earliest date practicable.

Notice of this motion has been served on opposing counsel in all cases.

JOHN W. DAVIS,  
*Solicitor General.*

OCTOBER, 1917.





U.S. SUPREME COURT, U. S.

FILED

OCT 2 1917

JAMES D. MAHER

IN THE

**SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1917.

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**No. 656.**

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CHARLES E. RUTHENBERG, ALFRED  
WAGENKNECHT, AND CHARLES BAKER,  
PLAINTIFFS IN ERROR,

vs.

**THE UNITED STATES OF AMERICA.**

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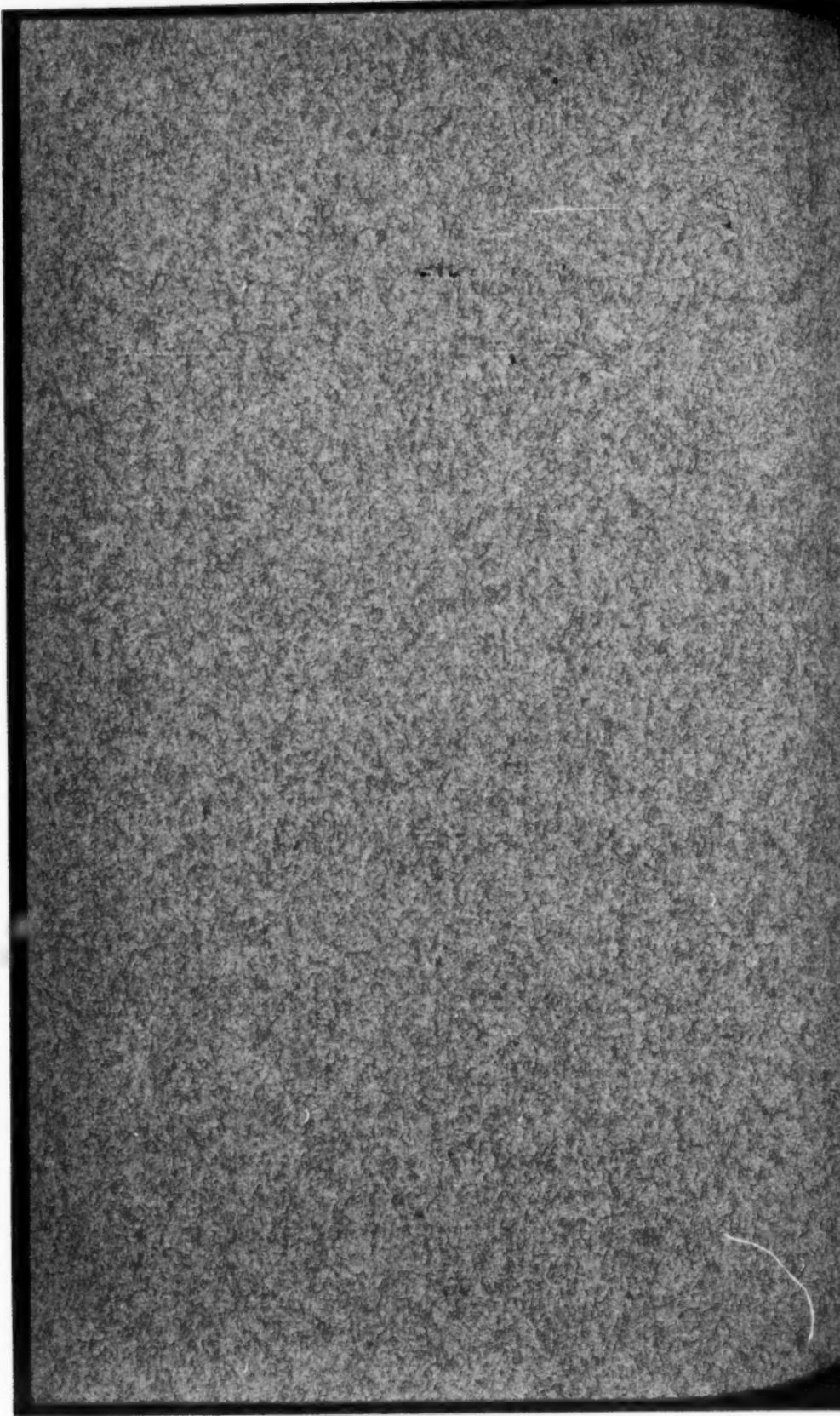
IN ERROR TO THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF OHIO.

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MEMORANDUM BY PLAINTIFFS IN ERROR OF OBJEC-  
TIONS TO MOTION BY THE UNITED STATES TO  
ADVANCE.

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**JOSEPH W. SHARTS,**  
*Of Counsel for Plaintiffs in Error.*



IN THE  
**SUPREME COURT OF THE UNITED STATES.**  
**OCTOBER TERM, 1917.**

---

**No. 656.**

---

**CHARLES E. RUTHENBERG, ALFRED  
WAGENKNECHT, AND CHARLES BAKER,  
PLAINTIFFS IN ERROR,**

*vs.*

**THE UNITED STATES OF AMERICA.**

---

**MEMORANDUM BY PLAINTIFFS IN ERROR OF OBJEC-  
TIONS TO MOTION BY THE UNITED STATES TO  
ADVANCE.**

---

The plaintiffs in error interpose their objection to the motion filed to advance the cause and to have it heard jointly with others known as the "Selective Draft Law" cases, for the reasons following:

1. This cause was decided in the trial court at the end of July and docketed on August 30, 1917. Copies of the printed record were not placed in

the hands of counsel until less than two weeks ago. Counsel have had no opportunity to prepare such a brief as the cause requires.

2. Fifty-nine points of error were assigned, and counsel earnestly believe that a large number of these should be carefully and thoroughly presented. Among these points of error are: Whether members of a particular political party may be excluded from jury service; whether a jury exclusively of political adversaries of these plaintiffs in error is an impartial jury; whether men of financial interests adverse to the activities of these plaintiffs in error which are involved in the offense charged are an impartial jury; whether a jury of certain counties to the exclusion of other counties is a proper jury of the State and District; whether an indictment may properly be returned by a grand jury without a sworn charge laid before it or any witness sworn and sent before it in the particular matter; whether men may properly be indicted as accessories to a misdemeanor; and many other questions as to due process of law, the proper admission of testimony, etc.

3. The constitutionality of the Draft Act is but one of several constitutional questions raised, and is not mainly relied on. The case, therefore, is different from the others, and we ask a separate hearing for it.

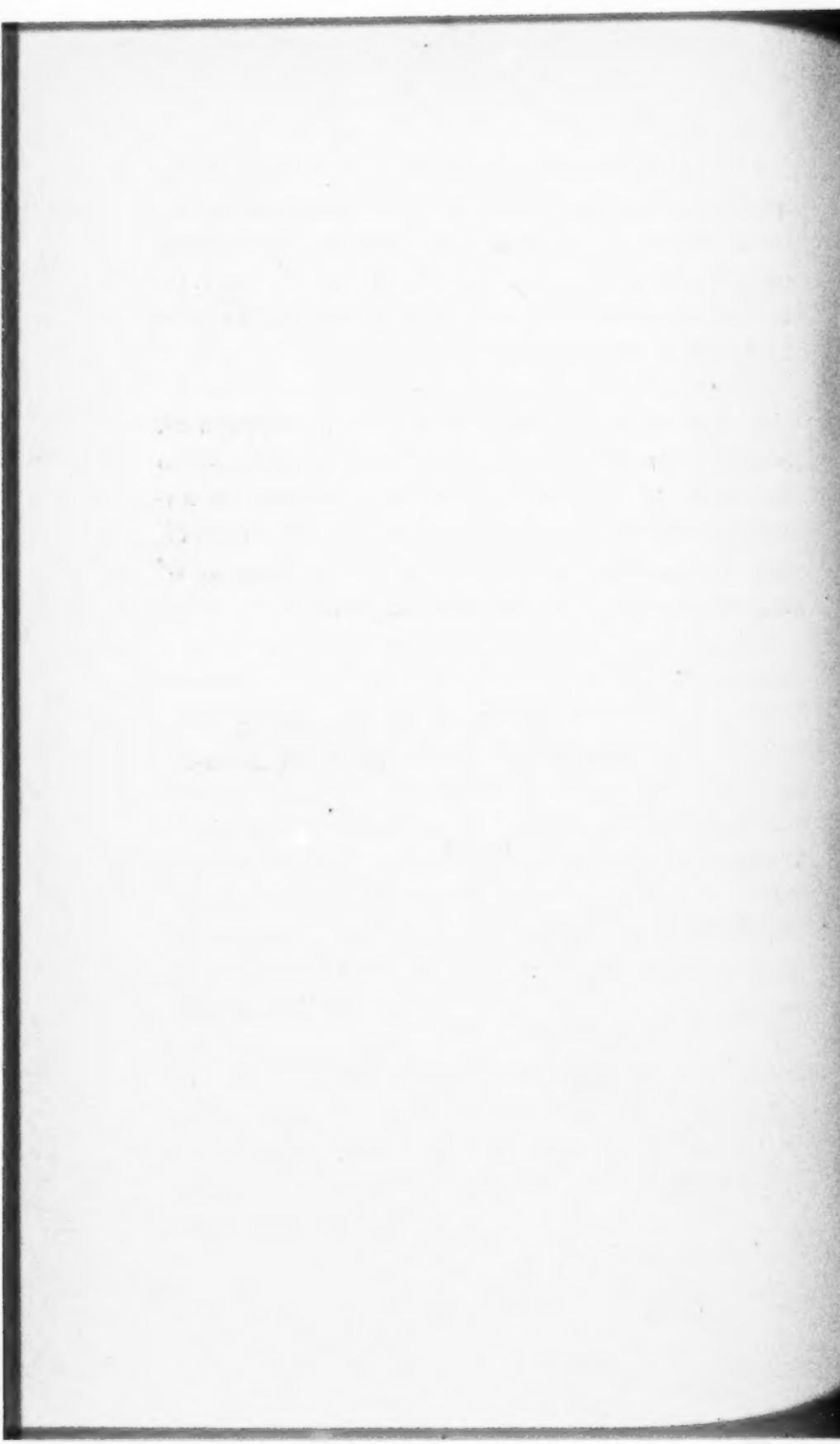
4. Counsel will be unable properly to prepare a brief covering comprehensively all the points relied on in less than three months, and if plaintiffs in error are forced to a hearing with the haste urged by the Department of Justice, it will be equivalent to an *ex parte* proceeding.

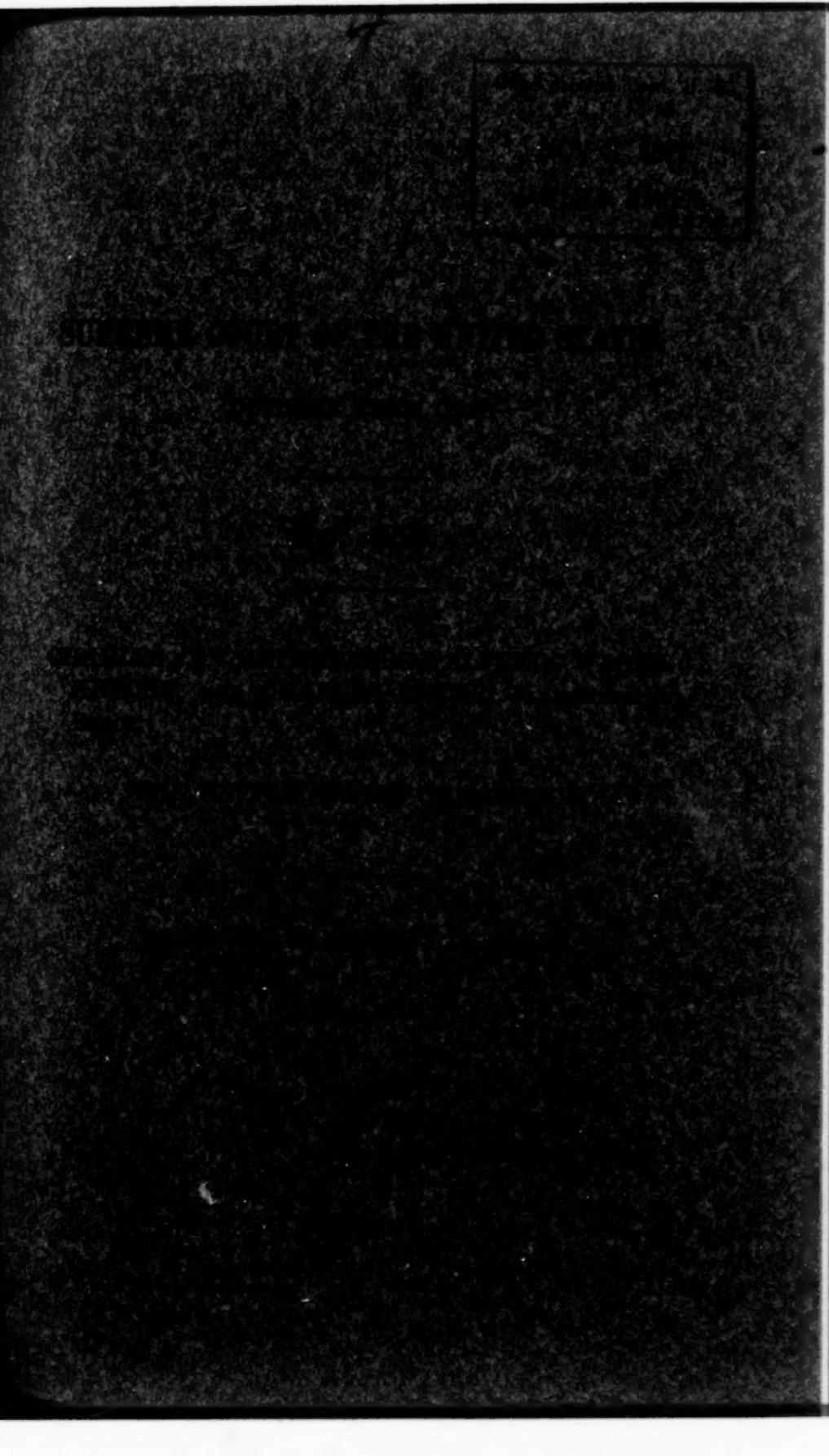
5. The case in the trial court was prepared almost entirely by Mr. Morris H. Wolf, of the Ohio bar, who, by the rules of this court, cannot be admitted to practice herein until December 16, 1917, and his personal participation in the hearing of this cause is regarded as most important.

Respectfully submitted,

JOSEPH W. SHARTS,  
*Of Counsel for Plaintiffs in Error.*

(35210)





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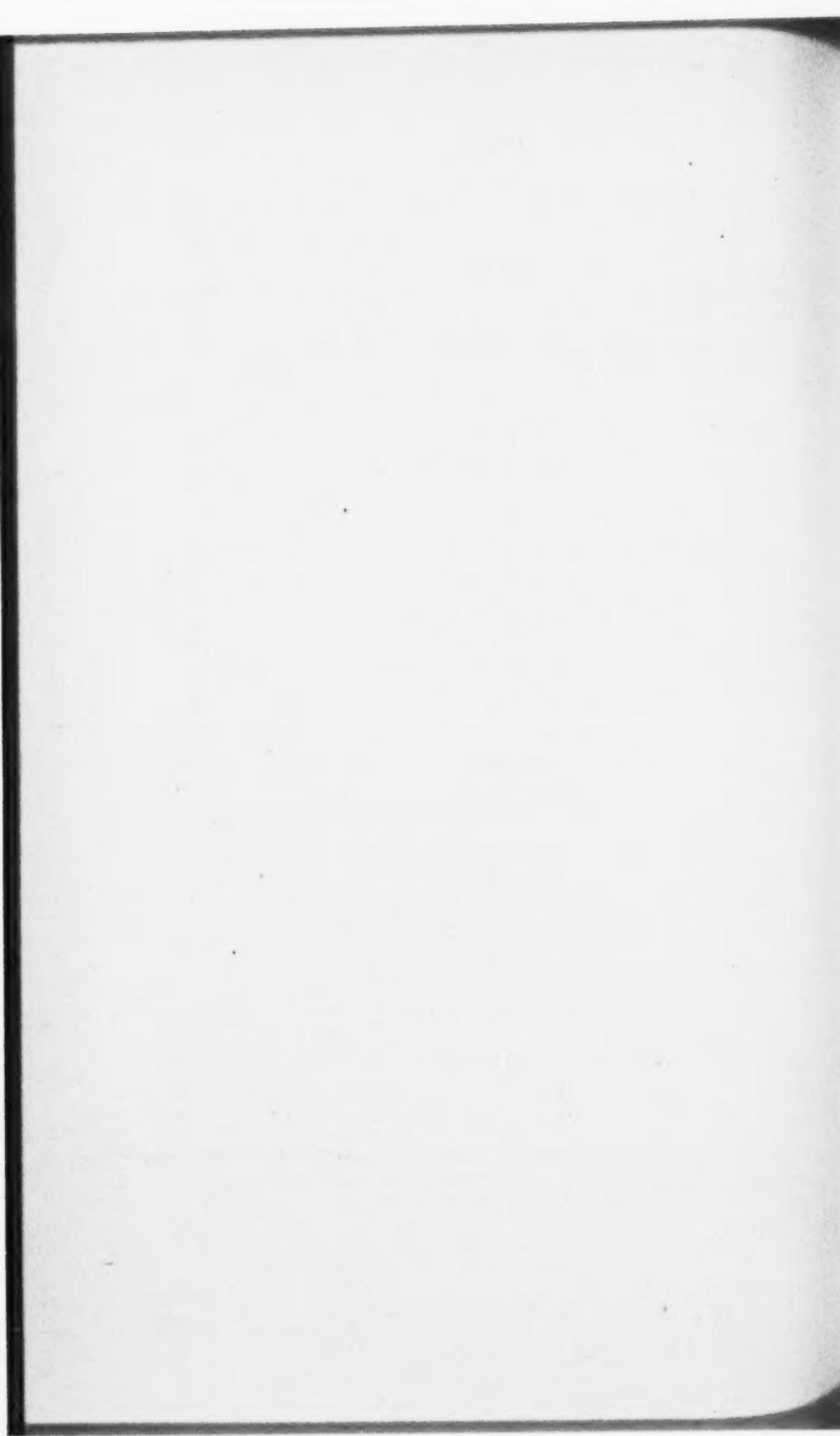
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(35532)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

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No. 656.

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CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

---

BRIEF FOR PLAINTIFFS IN ERROR.

---

Statement of the Case.

This matter comes up on writ of error to the District Court for the Northern District of Ohio, Eastern Division.

The grand jury for the April term, 1917, found an indictment against the plaintiffs in error, in the same count with one Alphons J. Schue, who was charged with failing to register on June 5th, 1917, as required by the Selective Service Act and the President's proclamation thereunder. The plaintiffs in error were charged with aiding, abetting, counseling, commanding, inducing, and procuring Schue, "before and at" said date, not to register.

The plaintiffs in error filed a verified challenge to the grand and petit jury arrays, alleging, among other grounds, that (1) they were officers of the Socialist party, and the acts charged must have been done, if at all, in pursuance of their duties as such officers; the Socialist party was without representation on and excluded from representation on the jury commission, which was composed exclusively of their political opponents; the jury lists had been made up exclusively of Republicans and Democrats, who were their political opponents, and Socialists excluded; the grand and petit jury venires had been made up exclusively of their political opponents, who by reason of political hostility were prejudiced and not impartial; (2) they had, in pursuance of their duties as said Socialist officials, advocated the abolishment of rent, interest, and profit, and these political activities were directly involved in the case, while the jury lists and venires had been made up exclusively of men who derived their income from rent, interest, and profit, and were therefore hostile and prejudiced by reason of private interest; (3) the jurors were drawn exclusively from the Eastern Division of the District, and from only part of the counties within the division, contrary to the Sixth Amendment of the Constitution. The court heard the challenge on evidence, but ruled out as immaterial all testimony tending to show the political complexion of the juries and jury commissioners, to which rulings the plaintiffs in error excepted. The testimony of the clerk, Mr. Miller, was that he had not selected names for jury service himself, but had obtained lists from common pleas judges, and that all the names were of persons within the division; also that not all counties within the division had been drawn from. The court overruled the challenge, the defendants excepting.

The plaintiffs in error then filed their motion to quash, alleging, among other grounds, that (1) the grand jury had presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation and without any proper testimony having been pre-

sented to the grand jury or any witnesses sworn in a particular matter; (2) the indictment failed to state that Schue was a citizen of the United States, or a male person not an alien enemy who had declared his intention to become a citizen at the time of the alleged offense; (3) the indictment failed to state the proclamation had been published at the time of the alleged offense, or was ever published; (4) it alleged three separate offenses in one count; (5) it failed to set forth any act or manner in which the plaintiffs in error did aid, abet, counsel, command, induce, and procure said Schue to commit the alleged offense, and failed to set forth the nature and cause of the accusation and apprise them of what they would be required to meet; (6) it charged the plaintiffs in error as accessories to a misdemeanor. The court overruled the motion, the plaintiffs in error excepting.

The plaintiffs in error offered to file their plea in abatement, repeating the allegation that the grand jury had brought in the indictment without evidence, but the court refused leave to file it, to which ruling they excepted.

Thereafter the plaintiffs in error filed their demurrer to the indictment, alleging, among other grounds, that (1) the facts set forth do not constitute an offense against the laws of the United States; (2) the Selective Service Act and proclamation thereunder are unconstitutional.

The court overruled the demurrer, the defendants excepting.

On the examination of the persons drawn for the petit jury, counsel for the plaintiffs in error attempted to examine them on their *voir dire*, for purposes of challenge, to ascertain if they distinguished between Socialists and anarchists, which line of examination the court refused to allow, the plaintiffs in error excepting.

The jury brought in a verdict of guilty; whereupon the plaintiffs in error filed their motion for a new trial and motion in arrest of judgment, reiterating among other grounds the points of error herein described. The court overruled the motions, to which the plaintiffs in error entered their

exceptions. And thereupon the plaintiffs in error sued out their writ of error herein.

#### Specification of Errors.

I. The trial court erred at the hearing of the challenge in refusing to admit testimony to show that the clerk of court was an adherent of the Republican party, the other jury commissioners were members of the Democratic party, and that the Socialist party, of which defendants were officers and members, was a minor political party within the district and was without representation on the jury board, contrary to defendants' constitutional right, as shown by the following (printed Record, pages 30 and 189):

"Q. Can you give the names of the principal political parties in the district?

"Mr. Wertz: I object.

"The Court: The objection will be sustained.

"Mr. Sharts: Exception.

"Q. What is your political affiliation?

"Mr. Wertz: I object.

"The Court: The objection will be sustained.

"Mr. Sharts: Enter an exception.

"Q. Will you state, Mr. Miller, what were the political affiliations of Mr. May?

"Mr. Wertz: I object.

"The Court: The objection will be sustained unless you make your question in the form I indicated a moment ago.

"Mr. Sharts: Exception.

"Q. State whether or not Mr. May was a member of the principal political party in the district opposing that to which you yourself belonged.

"A. He is.

"Q. State whether or not he was a member of the same political party with Mr. Sullivan.

"Mr. Wertz: I object.

"The Court: The objection will be sustained.

"Mr. Sharts: Enter an exception, for the reason that we expect to show that both Mr. Sullivan and Mr. May were members of the Democratic party and that Mr. Miller is a member of the Republican party, and that the Socialist party is without representation on the jury board."

II. The trial court erred at the hearing of the challenge in refusing to admit the testimony of the clerk of the Cuyahoga County board of elections, offered for the purpose of showing that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties, contrary to defendants' constitutional rights and section 276, Judicial Code, as shown by the following (printed Record, pages 185 and 38):

"Mr. Sharts: Now, if your honor please, I would like to call your attention, before I dismiss this witness (clerk of court), to the fact that we have here the clerk of the board of elections with a card index, and we expect to place him on the stand and we want to establish by a comparison between the card index of the clerk and the card index of the clerk of elections, that all of the names that went into the jury box at the time of these drawings were the names of Republicans and Democrats and not of Socialists, and I wish, before this witness goes, to make a request for him to produce the card index for that purpose.

"The Court: I will not require the witness to produce the card index for that purpose, and I will not receive testimony of the clerk of the board of elections for that purpose.

"Mr. Sharts: Enter an exception to the ruling of the court on the ground that we expect to show by

the introduction of this testimony that the grounds of our second challenge are true.

"The Court: No. What you proposed to show, Mr. Sharts, was that a comparison of the card index kept by Mr. Miller of the names in the jury box with the records of the board of elections—I suppose that is for Cuyahoga County, but for any county—would show the names in the card index were Democrats or Republicans.

"Mr. Sharts: The point was simply this: We ourselves have not the list of names. It is possible we might have gone and copied all those names off his card index, but we did not do that. In order to put those names to the board of elections, first, it will be necessary for us to have the card index to do it with, and I simply asked—

"The Court: I am prepared to rule on the assumption that you asked the clerk to produce the card index showing the list of names in the jury box, and that you proposed to show those names to the clerk of the board of elections, and that you proposed to have the clerk of the board of elections check them and say that the names of those on his card index are Democrats and Republicans. Now you may have an offer of proof in that form, and I will sustain an objection to it, but where I checked you was that you were proposing to show by the witness that the allegations and statements of a certain specification were true. You stated in your specification a whole lot more than you offered to prove. I do not think you intended to put it in that way, but that is the impression you made in my mind.

"Mr. Sharts: Does your honor make it a part of the record, your ruling, so that it will not be necessary—

"The Court: Yes, I so rule that you may have an offer to prove that and an exception."

III. The trial court erred at the hearing of the challenge in refusing to admit testimony offered for the purpose of showing that the names selected and placed in the jury box and those drawn for jury service were taken exclusively from the names of landowners, property-owners, and capitalists, as shown by the following (printed Record, pages 185 and 32):

"Q. State if you are personally aware, or if you have by investigation become aware, of the property qualifications, of the standing in the financial and commercial world, of any of the men whose names have been placed in the jury box by you.

"Mr. Wertz: I object.

"The Court: The objection to that will be sustained. I do not understand that the law under which we are operating disqualifies any man from being placed in the jury box or to serve on the jury because he has or has not property, and, therefore, the question is immaterial.

"Mr. Sharts: Enter an exception on the ground that by this question defendants expect to establish the allegations of the third ground of challenge to the jury array.

"Q. State whether or not the names placed in the jury box are the names of landowners, property owners, and capitalists?

"Mr. Wertz: Objection.

"The Court: The same ruling on that.

"Mr. Sharts: Enter an exception on the same ground."

IV. The trial court erred in not sustaining the challenge on the fourth ground thereof, to wit, that the juries had been selected and drawn exclusively from the eastern division instead of the entire district, contrary to the Sixth

amendment, as shown by the following (printed Record, pages 186 and 32, testimony of Mr. Miller, clerk of court):

"These jurors whose names have been selected are from the eastern division and from every county in the eastern division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out, and I cannot tell whether all the names from one county have been drawn out that have been put in and the list of names from that county has been exhausted, or whether still some are there."

V. The trial court erred in refusing to hear testimony offered to sustain the challenge on the ground that the clerk, without an order of the court directing him to select any parts of said division, in drawing the names for the grand jury did not draw any names from seven of the counties of the division, but drew six from Cuyahoga County, and in drawing the names for the petit jury drew none from eight counties within the division, but drew five from Cuyahoga, four from Columbiana, and three from Ashtabula, as shown by the following (printed Record, pages 187 and 36):

"Q. I will ask you (clerk of court), in the drawing of the names for the grand jury, how many counties within the division are not represented by any person residing therein?

"Mr. Wertz: I object.

"The Court: I will sustain the objection to that, because I have a well-defined conviction that the fact that some counties were not represented in the drawing is not a valid objection.

"Mr. Sharts: I would just like to call your honor's attention to the fact that the Judicial Code does not provide for drawing by lot; that is not the manner indicated by the Code. Enter an exception on the ground that defendants expect to show by the an-

swer that there were seven counties not represented by any names in that drawing.

"Q. I will repeat the same question with regard to the petit jury, for the purpose of the record. How many counties were unrepresented in the drawing for the petit jury?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the same grounds as before—that we expect to show by the answer of the clerk that there were eight counties from which no names had been drawn within the division.

"Q. I will ask the clerk to state how many names were drawn from Cuyahoga County?

"Mr. Wertz: I object.

"The Court: I will sustain the objection.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were five drawn from Cuyahoga County.

"Q. How many were drawn from Columbiana County?

"Mr. Wertz: I object.

"The Court: I sustain the objection.

"Mr. Sharts: Exception on the ground that we expect to show there were four drawn from Columbiana County.

"Q. How many were drawn from Ashtabula County?

"Mr. Wertz: I object.

"The Court: The same ruling.

"Mr. Sharts: Enter an exception on the ground that we expect to show that there were three drawn from Ashtabula County."

VI. The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service

had been improperly selected, as shown by the following (printed Record, pages 187 and 31):

"Q. State, Mr. Miller, how you arrived at your selection of names, what sources of information you used.

"Mr. Wertz: I object.

"The Court: I do not think that is a material line of inquiry, Mr. Sharts.

"Mr. Sharts: Enter an exception, because we expect to show by this witness that he has made use of the files of the board of elections and has drawn therefrom names of partisans of the Republican and Democratic parties and excluded the names of adherents of the Socialist party.

"The Court: In view of that tender of proof I will reverse the ruling and permit the question to be answered.

"A. I obtained the names by writing to the common pleas judges of this division for various counties, and asking them to send me a list of men in their counties qualified to serve as jurors.

"Q. Were the common pleas judges to whom you sent this request members of any political party?

"Mr. Wertz: I object.

"The Court: I sustain the objection to that question.

"Mr. Sharts: Enter an exception, because we expect to show that the common pleas judges to whom this witness applied for names were all of them members of the Republican and Democratic parties and not of the Socialist party.

"(Witness:) Other names that I used were those of men that I know personally, a very few, which I selected and put in, and occasionally some name will be suggested to me by some one and I place that name in a drawer, and some of those I select and

some of them I reject when I come to make up my list.

"Q. Do you know in what manner the list of names that were sent to you from the common pleas judges, as you have described, had been selected?

"A. Not in detail.

"Mr. Wertz: I object to the question. It would be hearsay.

"The Court: I sustain the objection to that question.

"Mr. Sharts: Enter an exception."

VII. The trial court erred in overruling the motion to quash the indictment, particularly on the following grounds: (1) The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case; (2) it fails to state that Schue was a citizen of the United States or a male person not an alien enemy, who had declared his intention to become a citizen, at the time said offense is alleged to have been committed; (3) it fails to state that the proclamation had been published at the time said offense is alleged to have been committed by these defendants, or was ever published; (4) it fails to negative the possible appointments provided for in subdivision third of section I of the draft act; (5) it alleges three separate offenses in one count; (6) it fails to set forth any act or manner in which these defendants did aid, abet, counsel, command, induce, and procure Schue to commit the alleged offense, and fails to set forth the nature and cause of the accusation and to apprise these defendants of what they will be required to meet; (7) it charges these defendants as accessories.

VIII. The trial court erred in refusing leave to the plaintiffs in error to file a plea in abatement containing, among

other grounds, the following: Said grand jury presented the indictment without these defendants having been charged with the alleged offense upon oath or affirmation, and without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive, or any witnesses sworn in a particular case (printed Record, pages 14, 15, and 19).

IX. The trial court erred in overruling the demurrer to the indictment, particularly on the following grounds: (1) The facts set forth therein do not constitute an offense against the laws of the United States; (2) it charges these defendants with being accessories to a misdemeanor; (3) the Selective Service Act and proclamation thereunder are unconstitutional (printed Record, pages 18 and 19).

X. The trial court erred, in the examination of the persons drawn for petit jury service, on their *voir dire*, to permit the following questions asked by the plaintiffs in error to be answered:

“Mr. Sharts: Is there any man here that does not know the distinction between the Socialists and the anarchists?

“Mr. Wertz: I object.

“The Court: That is not a proper question.

“Mr. Sharts: Is there any man here that does not know there is a very wide distinction between Socialists and anarchists?

“Mr. Wertz: I object to that.

“The Court: I will sustain the objection to that question. I am not going into a discussion of that question.

“Mr. Sharts: Enter the exception of the defendants to the ruling of the court.”

(Printed Record, pages 197, 48.)

## ARGUMENT.

### I. *Indictment and Trial by Political Adversaries Exclusively.*

The trial court heard evidence on the challenge to the jury, but ruled out as irrelevant all evidence tending to show that the defendant's political adversaries exclusively were selected for the jury commission, jury lists, panels, etc.

Discrimination in selecting a jury invalidates (*Thomas vs. Texas*, 212 U. S., 278). Ordinarily, membership in an opposite political party is not ground for challenge (*Connors vs. United States*, 158 U. S., 408). But here the political controversy directly involved, the jury being required to decide as to the purpose and effect of political speeches, raised a strong presumption that jurors of an opposite political opinion would be hostile to defendants and partisans of the Government.

The defendants were entitled to "an impartial jury" (*Constitution, art. III, sec. 2, clause 3; Amendments V and VI*). This includes freedom from political hostility (*Bucks County Jurors*, 20 Pa. Co. Ct., 36).

This right descends from Magna Charta as a barrier against "the approaches of arbitrary power" (*Thompson vs. Utah*, 170 U. S., 343; Mr. Justice Field in *Charge to Grand Jury*, 2 Sawy., 667; *Ex parte Bain*, 121 U. S., 1, 10; *Lysander Spooner's "Trial by Jury"*). But the barrier is gone when the Government, by whatever means or chance, may secure a jury entirely of its partisans to try its political adversaries.

Section 276, Judicial Code, was framed evidently to guard against this danger by providing a bi-partisan jury commission. But it fails to meet the present contingency, "where both principal" political parties are supporting the Government's policies and a third party opposing.

Such section creates an inequality under the law, bestow-

ing special privilege and protection on some political organizations and partisans and excluding others. The theory of our political institutions is that "in the pursuit of happiness all avocations, all honors, all positions are alike open to every one."

*Cummings vs. Missouri*, 4 Wall., 277.

*Ex parte Garland*, 4 Wall., 333.

*Butcher's Union Co. vs. Crescent City Co.*, 111 U. S., 746, 760; concurring opinion of Mr. Justice Bradley.

*Soon Hing vs. Crowley*, 113 U. S., 703.

*Allgeyer vs. Louisiana*, 165 U. S., 578.

The jury must be composed "of persons having the same legal status in society" as the defendant (*Strauder vs. West Virginia*, 100 U. S., 303). But when the defendants are of a political class excluded from the jury commission, they are not of the same legal status.

## II. *Indictment and Trial by Jurors Adversely Interested.*

The speeches, the general meaning, intent, and effect of which the jurors were required to decide, were attacks upon "the capitalist class," viz., persons deriving an income mainly from rents, interest, and dividends, and were exhortations to the public to abolish such forms of property ownership as produce rents, interest, and dividends. The trial court rejected as immaterial evidence tending to show the jurors had been selected exclusively from persons of the class attacked.

Even the most remote pecuniary or other special interest in the outcome of a case usually bars one from jury service. Thus residents of a town which may receive the benefit of a penalty are not competent as jurors (*Alexander vs. Brockett*, Fed. Cas., No. 181; 1 Cranch C. C., 505; *State vs. Williams*, 30 Me. (17 Shep.), 484; *Hawes vs. Gustin*, 84 Mass. (2 Allen), 402). Petitioners for a new road have been held

incompetent on a question of damages between county and landowner (*Almand vs. Rockdale*, 78 Ga., 199). The smallest degree of interest is a decisive objection (*Lynch vs. Horry*, 1 Bay (So. Car.), 229). General hostility is good cause of challenge (*Brittain vs. Allen*, 13 N. C., 120).

Admitting that ownership of property is not a disqualification ordinarily, the circumstances of a particular case may create from certain forms of ownership a presumption of self-interest likely to prejudice the juror, at least to the extent of requiring the court to entertain an offer of proof.

A juror to be impartial must be "indifferent, as he stands unsworn" (*Co. Litt.*, 155 b. *Reynolds vs. U. S.*, 98 U. S., 145).

### III. *A Jury Not of the State and District.*

The Constitution, Amendment VI, requires the jury to be "of the State and district."

The grand and petit juries were drawn exclusively from the eastern division of the district. The grand jury purported (on the indictment) to be "inquiring for that division and district." The jury commissioner resided in the western division; but the jury lists were confined to the eastern division.

If the eastern division be regarded as "the district previously ascertained by law," the jurors were selected by a commissioner not qualified under section 276, Judicial Code, because not "residing in the district."

But if "district," under the Sixth Amendment, means the entire district, it would seem a judge has no power constitutionally to limit the drawing of the jury to any part or division, although section 277, Judicial Code, purports to authorize him (*United States vs. Dixon*, 44 Fed. R., 401). A contrary position to that of Judge Hoffman in the Dixon case was taken by other district courts in *United States vs. Wan Lee*, 44 Fed. R., 707, and *United States vs. Ayres*, 46 Fed. R., 651. Counsel have found no decision by the Supreme Court on this question.

In the Ayres case Judge Shiras indicated a distinction in the Dixon case, viz., that there the jury purported to be of only the division. But if that be of value, it exists also in the present case, by the wording of the indictment.

The constitutional restriction, "which district shall have been previously ascertained by law," would seem to veto any authority in the judge to designate a part or division of the district. The framers of the Constitution evidently sought to safeguard the defendant against the exercise of any arbitrary power.

By the common law a juror of the "county" was "from every quarter of the county \* \* \* some out of every hundred" (*Blackstone's Comm.*, Bk. III, chap. 23, pages 359-60; Bk. IV, chap. 23, page 302). The course of the common law as it existed at the time of the adoption of the amendment controls (*Thompson vs. Utah*, 170 U. S., 343). Therefore it would seem the framers of the Constitution meant by a "jury of the district" a jury from every quarter of the district.

The error complained of is, also, that even within the division several of the counties were not drawn from at all; the clerk's method of drawing produced this result, without an order of court designating any parts. Many State decisions hold that a jury drawn from only parts of a county constitutes a denial of the constitutional right.

*Schaffer vs. State*, 1 How. (Miss.), 238.

*Zanone vs. State*, 97 Tenn., 101.

*People vs. Hall*, 48 Mich., 482.

*Hartshorne vs. Patton*, 2 Dall. (Pa.), 252.

*Gibbons vs. Van Alstyne*, 9 N. Y. Sup. Ct., 156.

*People vs. Kelly*, 31 Hun. (N. Y.), 225.

*Mandeville vs. Raynolds*, 68 N. Y., 528.

*State vs. Nash*, 48 La. Ann., 194.

*People vs. Coughlin*, 67 Mich., 466.

*Hewitt vs. Circuit Judge*, 71 Mich., 291.

*Babcock vs. People*, 13 Colo., 515.

*Wash. vs. Commonwealth*, 16 Gratt. (Va.), 531.

The same reason would invalidate a jury drawn from only some counties of the division.

#### IV. *Jury Lists Improperly Selected.*

The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

It has been held where a jury list was prepared from names selected by others than the authorized officials, though afterwards approved by the commissioners, it is vitiated (*United States vs. Murphy*, 224 Fed. R., 554; *State vs. Austin*, 183 Mo., 478; *Louisville, N. & St. L. Ry. Co. vs. Schwab*, 127 Ky., 82). It was even held where a statute provided the judges should meet and select the list a grand jury was not properly organized where the list was prepared by a deputy clerk and submitted to the judges separately and approved by them separately (*Clare vs. State*, 30 Md., 165).

The need of guarding the selection of grand jurors was long ago recognized. Statute 11 Hen., 4, cap. ultimo, recites that inquests had been formerly returned by persons outlawed, fled to sanctuary for treason or felony, etc., and enacts: "That no indictments be made by such persons but by inquest of loyal subjects returned by the sheriffs or bailiffs duly, *without denomination of any person, but only by the sworn bailiffs and ministers of the sheriff; and if any indictment be otherwise taken, it is void.*" (See Sir Matthew Hale's "History of Pleas of the Crown" (1st Am. ed.), vol. II, page 155.)

The question was raised before this court in *Rodriguez vs. United States*, 198 U. S., 156, but was disposed of on the ground that no exception had been taken. Mr. Justice Harlan said, however, in the opinion, "There are authorities which give some support to the view that this requirement is of substance, and not a mere 'defect or irregularity

in matter of form only.' (Rev. Stat., sec. 1025; *Hulse vs. State*, 35 Ohio St., 421.)"

V. *Indictment without Evidence.*

The plaintiffs in error moved to quash the indictment because it had been found without a sworn charge previously filed, without the record disclosing any witness sworn and sent before the grand jury in this matter, or any action taken on the grand jury's own knowledge. The motion was overruled. They also offered a plea in abatement on this ground, which the court refused to entertain.

Jury trial should be according to the course of the common law as it existed at the time the constitutional amendment was adopted (*Thompson vs. Utah*, 170 U. S., 343). Neither Federal courts nor Federal grand juries may assume any larger powers over the liberty of any person than therein accorded.

The common law did not admit of a grand jury's finding an indictment without evidence of some sort. It might bring in a presentment, on the knowledge of one or more jurors, "signed by all the jurors" (*In re Grosbois*, 109 Cal., 445). But the presentment must be afterwards reduced to a formal indictment before any one could be required to answer to its charge.

*Hale vs. Henkel*, 201 U. S., 43, 60.

2 *Hawkins, Pleas of the Crown*, chap. 25, sec. 1.

*Charge of Mr. Justice Field*, 2 *Sawy.*, 667; 30 Fed. Cas., #18, 255.

In the Matter of the Communication of the Grand Jury, in *Lloyd vs. Carpenter*, 3 *Clark* (Pa.), 188. *Commonwealth vs. Green*, 126 Pa. St., 531.

*In re Grosbois*, 109 Cal., 445.

*Jones vs. People*, 100 App. Div. (N. Y.) 55; 92 N. Y. Supp., 275.

*Collins vs. State*, 13 Fla., 651.

*Ex parte Chauvin*, Charlt. (Ga.), 14.

*State vs. Darnal*, 1 Humph. (Tenn.), 290.

*State vs. Millain*, 3 Nev., 371.

*State vs. Cain*, 8 N. C., 352.

*State vs. Cox*, 8 Ark., 436.

5 *Bacon's Abridgement*, 98, tit. "Indictment."

In *Lloyd vs. Carpenter* and *Commonwealth vs. Green*, *supra*, the decisions are based on the constitutional right to be secure against unreasonable searches and seizures and against the issuing of a warrant without probable cause supported by oath or affirmation.

Constitution, Amendments IV and V.

Admitting that Federal grand juries may of their own motion call witnesses and institute prosecutions, this does not mean that they may indict without sworn statement of some sort. If the indictment is brought on their own knowledge it should so declare.

VI. *The failure of the indictment to state that Schue was a "citizen, or a male person not an alien enemy who had declared his intention to become a citizen."*

Selective Service Act, section 2:

"Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive," etc.

Section 5, "That all male persons \* \* \* shall be subject to registration," etc., must be so read as to harmonize with section 2. The act clearly applies to the "militia" as defined in the National Defense Act of June 3, 1916 (sec. 57). Any "regulations" by the President requiring others

than the "militia" to register are in excess of his authority, because "inconsistent with the terms of this act" (sec. 2).

"However mutually located are the provisions of a statute, an indictment thereon, as on the common law, must aver all negatives necessary to show affirmatively an offense."

I *Bishop's New Criminal Procedure* (4th ed.),  
sec. 637, page 375.

*U. S. vs. Cook*, 17 Wal., 168.

The indictment being so framed as not to negative the possibility that Schue was either an alien enemy or an alien who had not declared his intention to become a citizen, failed to set forth an offense.

VII. *Failure of Indictment to Aver that the Proclamation had been Published.*

"Every such person (subject to registration) shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction."

Sec. 5, Selective Service Act.

There is no allegation that the President had published his proclamation before the actions of the plaintiffs in error complained of.

It is true, courts take judicial notice of proclamations, regulations etc., in criminal pleadings (*The Greathouse Case*, 2 Abb. (U. S.), 382; *Jones vs. U. S.*, 137 U. S., 202; *Caha vs. U. S.*, 152 U. S., 211, 221). Federal courts have taken judicial notice of which regulation is referred to as violated, although the indictment does not state which (*U. S. vs. Moody*, 164 Fed. R., 269; *U. S. vs. Slater*, 123

Fed. R., 115). Or whether a Federal or a State statute is meant by the words "against the form of the statute" (*U. S. vs. Wright*, 28 Fed. Cas., No. 16,774). Or whether an indictment is correct in averring that Navassa Island, where the offense occurred, was within the jurisdiction of the United States (*Jones vs. U. S.*, 137 U. S., 202). None of these ambiguities, when cleared up, changed or added to the facts which concerned the jury.

But judicial notice cannot read into an indictment a material fact not there before. That would be to change the work of the grand jury, adding what was perhaps contrary to the grand jurors' intention.

*Ex parte Bain*, 121 U. S., 1.

*U. S. vs. Howard*, 132 Fed. R., 325, 344.

Whether the plaintiffs in error had aided, abetted, counselled, etc., *before the publication* of the proclamation or afterwards, was a fact quite material in determining whether they had committed any offense. It was for the grand jury, not the court, to supply this material allegation.

### VIII. Separate Offenses Charged in One Count.

The indictment charges in one count that (1) Alphonse J. Schue failed to register; (2) Charles E. Ruthenberg *et al.* did "aid" him not to register; and (3) did "abet, counsel, command, and induce" Schue not to register.

Schue's offense is made a misdemeanor by section 5, Selective Service Act.

The offense of "aiding" is possibly created by section 6: "\* \* \* and any person \* \* \* otherwise evades or aids another to evade the requirements of this act \* \* \* shall be guilty of a misdemeanor," etc.

The third offense is nowhere created by the act itself, but was said, at the hearing below, to be covered by section 332, Criminal Code.

It is elementary that only one offense can be charged in one count.

*Bishop's New Criminal Procedure* (4th ed), I, chap. 29, sec. 432.

*U. S. vs. Sharp*, Peters, C. C., 131.

IX. *Failure to Set Forth the Nature and Cause of the Accusation.*

Constitution, Amendment VI.

The indictment specifically states the offense of Schue, but for the others alleges only that they "well knowing said Schue to be such person subject to such registration, at Cleveland aforesaid, in said division and district, *before* and at the time of his so doing, unlawfully did aid, abet, counsel, command and induce said Schue in so unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto as aforesaid, and procure him to commit the offense involved in his so doing."

The general rule that it is sufficient in misdemeanors "to charge the offense in the words of the statute" (*U. S. vs. Mills*, 7 Pet., 142), must "be limited to cases where the words of the statute themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. The crime must be charged with precision and certainty. \* \* \* Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged (*Evans vs. U. S.*, 153 U. S., 584).

It is true this court has held "it is not necessary that the particular act by which the aiding and abetting was consummated be specifically set out" (*U. S. vs. Gooding*, 12 Wheat., 460). But it will be observed in all

cases holding as above, the nature of the act is so particularized that no reasonable doubt is left as to how the aider and abettor must have been connected with it if at all. Thus in *U. S. vs. Gooding, supra*, the defendant was charged as "owner" with procuring a ship to be fitted out for slave trading. See also *U. S. vs. Simmons*, 96 U. S., 360, 363; *Coffin vs. U. S.*, 156 U. S., 432, 448.

Nowhere is a hard-and-fast rule prescribed that there must be no specifying how the aiding and abetting was done. On the contrary, the courts have been careful to say, "there are doubtless cases where more particularity is required \* \* \* the course has been to leave every class of cases to be decided very much on its own peculiar circumstances (*U. S. vs. Gooding, supra*).

Peculiar circumstances surround the present indictment. It charges Schue with *not* doing a certain thing, and the plaintiffs in error with aiding and abetting him beforehand in *not* doing it. Counsel have been unable to find any other case where a person is charged with helping another in negative conduct. Where a positive act is done, there is a definite center from which to work in discovering how another may have aided in the act. But where *nothing* is done, the mind gropes in infinitude. How did they "aid" Schue in *not* registering? As the evidence shows, they had never met Schue. They were engaged in multifarious political activities. Was Schue influenced by printed leaflets, form, letter, speech, song, public exhortation, private appeal? And when? Where? The indictment says, "before." How long before? All they could know till the moment of trial was, they were charged with "aiding" a man unknown to them, somewhere in Cleveland, sometime before the registration, *not to register*. It was a legal ambush into which they were driven blindfold.

The offense, if at all, is a statutory misdemeanor. There is no "aiding and abetting" a misdemeanor at common law. The words, therefore, have not a strict technical meaning.

as at common law. They are "to be understood as in the common parlance, and import assistance, co-operation, and encouragement."

*U. S. vs. Gooding, supra.*

*U. S. vs. Lombardo, 241 U. S., 73.*

The words have no strict technical meaning, the reasoning of Mr. Justice Wood, in *U. S. vs. Britton*, 107 U. S., 655, on a similar phrase, is applicable.

"The words 'wilfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle.' \* \* \* They do not, therefore, of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one" (cited and emphatically approved by Mr. Justice Field in his dissenting opinion in *Evans vs. U. S., supra*).

The words "aid, abet, counsel, command, and induce" are generic terms. They are conclusions, not facts. Facts are to be stated, not conclusions.

*U. S. vs. Cook, 17 Wall., 168.*

*U. S. vs. Cruikshank, 92 U. S., 542.*

As these generic terms are applicable to many different kinds of facts, how may we know which set of facts was found by the grand jury to constitute "aiding and abetting?" The grand jury may have based its indictment on an entirely different set of facts from those on which the petit jury was asked to base its verdict.

The logic of Mr. Justice White, in his dissenting opinion in *Rosen vs. U. S.*, 161 U. S., 29, 43, applies here:

“\* \* \* how can it be said that there has been such a presentment, when on the very face of the record it is absolutely impossible to determine what matter the grand jury charged to the obscene? \* \* \* The Constitution requiring that the grand jury should find the indictment, neither the court, the prosecuting officer, nor any one else have power to create the necessary averments to make that an indictment which otherwise would be no indictment at all. This case illustrates the danger of departing from constitutional safeguards.”

The plaintiffs in error were entitled to know not only the “nature” but the “cause” of the accusation. What were the facts which caused the grand jury to charge them with this offense? The field of conjecture left open by the vague wording of the indictment is so wide that the plaintiffs in error were deprived of their constitutional right.

#### X. Accessories to a Statutory Misdemeanor.

In misdemeanors there are no accessories either before or after the fact.

*U. S. vs. Sykes*, 58 Fed. R., 1000.

*Charge to Grand Jury*, 2 Curt. (U. S.), 637; 30 Fed. Cas. No. 18,250.

*U. S. vs. Hartwell*, 3 Cliff., 221; 26 Fed. Cas. No. 15,318.

*U. S. vs. Gooding*, 12 Wheat., 460.

The indictment, however, attempts to charge the plaintiffs in error with being accessories before the fact to a statutory misdemeanor. No such offense being known to the common law, has it been created by statute? In *U. S. vs. Gooding*, *supra*, and other cases where persons were charged

with aiding and abetting a statutory misdemeanor, the statute creates the offense and provides the punishment for those who directly or indirectly by aiding and abetting commit the deed. No such provision for those "aiding and abetting" is found in the Selective Service Act, unless in section 6 ("any person who \* \* \* otherwise evades or aids another to evade the requirements of this act"). But it would seem that clause is limited to those charged with the duty of carrying into effect the provisions of the act.

The indictment follows not the language of section 6, however, but section 332, Criminal Code: "Whoever directly commits any act constituting an offense defined by any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal."

But this is not a penal statute creating new offenses; it regulates the punishment of offenses already created. It is not worded like a statute creating new offenses. "The legislative authority must first enact a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

*U. S. vs. Hudson*, 7 Cranch, 32.

*U. S. vs. Brewer*, 139 U. S., 278.

*U. S. vs. Lacher*, 134 U. S., 624.

*Ballew vs. U. S.*, 160 U. S., 187.

*U. S. vs. Eaton*, 144 U. S., 677.

As a criminal statute it would be void for indefiniteness, "offering no standard of conduct it is possible to know in advance and comply with."

*International Harvester Co. vs. Kentucky*, 234 U. S., 216.

*Tozer vs. U. S.*, 52 Fed. R., 917, 919.

The history of section 332 bears out this view. It was taken partly from Rev. St. 5323 ("Every person who knowingly aids \* \* \* to commit any murder \* \* \* is an

accessory before the fact") and Rev. St. 5427 ("Every person who \* \* \* aids or abets \* \* \* in the commission of any felony denounced in the three preceding sections," etc.), and made of general application. "Where the charge is of crime, it must have clear legislative basis."

*U. S. vs. George*, 228 U. S., 14.

*Williamson vs. U. S.*, 207 U. S., 425.

The misdemeanor with which Schue is charged is the violation of not a statute, but a regulation or proclamation of the executive department. The Supreme Court has carefully distinguished between a thing "required by law" and a thing required only by regulation. Unless the regulation is clearly within the authority conferred by the statute, a violation of it has been held not to be a violation of a thing required "by law."

*U. S. vs. Eaton*, 144 U. S., 677.

*U. S. vs. George*, 228 U. S., 14.

With this scrupulous care against allowing offenses to be created "by regulation," it would seem that where the Selective Service Act itself has not seen fit to extend its punitive clauses to the wide and ill-defined field of indiscreet disobedience, the court is not justified in the inference that the legislative power meant to prescribe a punishment for "aiders and abettors" as well as for those who directly disobey the President's proclamation and regulation. If Congress had meant to extend its punitive power so far, it could easily have said so.

*XI. The Selective Service Act is unconstitutional and void in all its parts, for the reasons following:*

*A. Its Terms are Beyond the Powers of Congress.*

The "main design" of the act is to provide for calling forth the "militia" designated as such by the National Defense Act of June 3, 1916, section 57.

The power of Congress here is limited to three purposes: "to execute the laws of the union, suppress insurrections, and repel invasions."

Constitution, art. I, sec. 8, c. 15.

The main design of the act is not within these limitations. It is to send armies abroad to engage in a foreign war. The amendment of June 1, 1917, which refers to "serving without the United States," and the President's proclamation, indicate this. It refers to "the existing emergency," which is not within these limitations, as the court may take judicial notice.

*United States vs. Hamburg American Co.*, 239 U. S., 466.

The title is: "An Act to authorize the President to increase temporarily the Military Establishment of the United States."

Compare it with the act of February 28, 1795:

"That whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia," etc.

And with the Draft Act of March 3, 1863:

"Whereas there now exists in the United States an insurrection and rebellion against the authority thereof, and it is, under the Constitution of the United States, the duty of the Government to suppress insurrection and rebellion," etc.

This court has often held that when the terms of a statute are so broad as to extend beyond the power of Congress, the courts are not at liberty to introduce words of limitation to bring it within that power.

*The Trademark Cases*, 100 U. S., 82.  
*James vs. Bowman*, 190 U. S., 127.

*U. S. vs. Reese*, 92 U. S., 214.  
*U. S. vs. Ju Toy*, 198 U. S., 253.  
*McKenzie vs. Hare*, 239 U. S., 299, 308.

If the "main design" is beyond the limited power of Congress, the registration clause, with its punitive provision, is also void, being merely auxiliary.

*Virginia Coupon Cases*, 114 U. S., 269.

But it will be urged, Congress derives its power herein not from the clause recited but from article I, section 8, clause 12: "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

The Supreme Court has never passed on this question. In *Martin vs. Mott*, 12 Wheat., 33, it held the act of February 28, 1795, valid. But that act authorized the President, in cases of invasion, etc., to call forth the militia by requisition on the Governors of States. In *Kneedler vs. Lane*, 45 Pa. St., 238, the Pennsylvania judges rendered an opinion on the Draft Act of 1863. But that decision is not in point here because: (1.) the act of 1863 was expressly for suppressing insurrection, and (2.) it was finally decided that the act of 1863 was not a calling forth of the "militia," but a raising of armies.

If the power "to raise and support armies" implies enforced levies upon the citizenship of the States when necessary, and this power is unrestricted by the limitations on calling forth the militia, it may be conceded the Congress might proceed to raise armies in that way. But that cannot be contended for the present act, since the National Defense Act, section 57, has designated the men drafted hereunder as "militia." If "militia," Congress can call them into the service of the United States only in the manner and for the limited purpose described.

But it may be urged the "militia" drafted directly by the

Federal Government under this act is a national militia, as distinguished from the State militia. As the Constitution does not so distinguish, it would be highly presumptuous to discover such a blighting distinction lurking among the implied powers attendant upon the power "to raise and support armies."

It is unbelievable that the framers of the Constitution, who so jealously guarded and limited the Federal Government's power to call forth the State's militia, lest it strip from the State and the people that which their race-history had taught them to cherish as the shield of their liberties against despots, meant at the same time to leave an implied power whereby Congress might accomplish the very thing. The two powers, of State and Federal Government, over the same "militia" are mutually destructive. They are incompatible.

The purpose of the framers of the Constitution was to guard against encroachments by the central authority upon the liberties of the people. They feared a big army under its control. That fear shows itself in many clauses. Thus, they limited "appropriations of money to that use" to two years. They reserved "to the States respectively the appointment of the officers and the authority of training the militia." They declared "a well-regulated militia" to be "necessary to the security of a free State," and forbade infringement of "the right of the people to keep and to bear arms." These elaborate precautions for guarding the front door against encroachments of the Federal power are rendered ridiculous if the Federal Government may enter by a back door and possess itself of the militia.

The militia was a State institution before any Federal Government was created. Every State constitution provides for it. Every State has the undoubted power to draft its male citizens as a part of its militia. There is no evidence of any intention to relinquish any of this State power to the Federal Government. On this, as other subjects, all powers not delegated were reserved (Amendment X).

It is significant all English colonies—Canada, Australia, etc.—view the “militia” as a home defense, not subject to be drafted by the central power for foreign service. England depended on voluntary enlistments for foreign service until recently, when she changed her unwritten constitution by an act of parliament.

*Stephens Commentaries on the Laws of England*  
(15th ed.), II, chap. 8, page 646.

Madison in “*The Federalist*,” No. XLVI.

Opinion by Judge Advocate General Crowder, to the Secretary of War, December 29, 1911.

Opinion by Mr. Wickersham, Attorney General, to the Secretary of War, February 17, 1912.

“*Opinions of Attorney General*,” vol. 29, page 322.

“*An Address to the Congress of the United States*,”  
by Mr. Hannis Taylor, recently published.

#### B. *It Attempts an Unconstitutional Delegation of Power.*

The power of Congress “to raise armies” is a direct power. But it may only “provide for calling forth the militia,” implying that the actual calling forth is to be done for another than Congress.

As already shown, the Selective Service Act cannot be an exercise of the power to provide for calling forth the militia. But if it be an exercise of the power “to raise and support armies,” Congress has delegated to the President the power which was entrusted only to it. It cannot delegate its power thus (*Cooley's Constitutional Limitations*, 7th ed., page 163). It may delegate power to determine some fact, but not to “make a law” (*Field vs. Clark*, 143 U. S., 683; *Monongahela Bridge Co. vs. U. S.*, 216 U. S., 177). The test is “whether Congress legislated on the subject as far as was reasonably practicable” (*Butterfield vs. Stranahan*, 192 U. S., 470; *Red Oil Mfg. Co. vs. Board of Agriculture*, 22 U. S., 380).

The Selective Service Act begins: "That in view of the existing emergency \* \* \* the President be, and he is hereby, authorized—First, Immediately to raise." \* \* \* Such are the provisions throughout. Everything is left to the President's "discretion." His powers are practically unlimited.

The fatal weakness of the present act is shown by comparison with the Draft Act of March 3, 1863: "Be it enacted \* \* \* That all able-bodied male citizens \* \* \* except as hereinafter excepted, are hereby declared to constitute the national forces," etc. Congress there raised the army itself.

If Congress may delegate thus its power to "raise" armies, it may also delegate to the President its power to "support" armies. And, if to the President, why not to any one else?

English history forbids the idea that the framers of the Constitution meant the power of raising armies to be exercised by any other than the legislative body directly responsible to the people. The Civil War of 1645-9 had been fought between armies raised by King Charles I and those raised by Parliament.

"Under the guise of regulation, legislation cannot be exercised."

*United States vs. George*, 228 U. S., 14, 20.

*United Verde Copper Co.*, 196 U. S., 207.

*C. It Violates the States' Right of Appointment of Officers and Authority to Train the Militia.*

Returning to the other horn of the dilemma, if the Selective Service Act be an exercise of the power to "provide for calling forth the militia," it violates article I, section 8, clause 16, which reserves "to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

The act throughout authorizes the President "to draft

\* \* \* organize, *and officer*," etc. "To raise by draft \* \* \* and to provide the necessary officers," etc. "The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training," etc.

#### D. It Usurps Judicial Power.

The act, section 4, authorizes the President, "in his discretion, to create and establish throughout the States \* \* \* local boards. \* \* \* Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the military establishment, to be chosen from among the local authorities. \* \* \* Such boards shall have power \* \* \* to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for *including or discharging individuals or classes of individuals* from the selective draft," etc. District boards are also authorized, with power "to review on appeal, and affirm, modify or reverse any decision of any local board. \* \* \* The decisions of such district boards shall be final," subject to review by the President. \* \* \* "Any member \* \* \* may be removed and another appointed by the President, whenever he considers that the interest of the nation demands it."

The Constitution, Art. I, sec. 8, clause 9, empowers Congress "to constitute tribunals inferior to the Supreme Court." Viewed as tribunals, these "boards" are not inferior but independent of the Supreme Court. Moreover, they are not constituted by Congress itself, the power to create them is delegated to the President. By Art. III, sec. 1, "the judges \* \* \* shall hold their offices during good behavior, and shall at stated times receive for their services a compensation." None of these safeguards to an independent judiciary obtain.

It will be urged they perform only a ministerial function, but that is not true. That they are called "boards" is immaterial. We must look to "the substance and intent" (*United States vs. Ferreira*, 13 How., 40). The claims to be decided are not mere claims against the government for damages etc., as in *U. S. vs. Ferreira, supra*, and *U. S. vs. Ritchie*, 17 How., 525. Nor preliminaries to a court finding, as in the latter case. The question involved is the personal liberty of the citizen, of which he is not to be deprived without "due process of law" (Constitution, Amendment V). The Selective Service Act attempts to make the registration strip the citizen automatically of his civil rights, his right of recourse to the ordinary courts, etc. (Sec. 5) "All persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom," etc.

This is judicial power, and must be exercised by the regular judicial tribunals, unless the citizen whose liberty is involved be in the military or naval service ("Ex parte Milligan", 4 Wall., 447; *Fong Yue Ting vs. U. S.*, 149 U. S., 698, particularly the dissenting opinions of Mr. Justice Brewer, Mr. Justice Field, and Chief Justice Fuller. See also *Interstate Commerce Commission vs. Brimson*, 154 U. S., 447).

The only alternative is, that the citizen thus subjected to the decision of the "boards" is already in the military or naval service. The Constitution, art. 1, sec. 8, clause 16, empowers Congress "to provide for organizing, arming and disciplining the militia and the governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

In the Constitutional Convention, "Mr. King, by way of explanation, said that by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying

the kind, size and calibre of arms—and by *disciplining*, prescribing the manual exercises, evolutions, etc."

*Elliot's Debates on the Federal Constitution* (Lippincott, 1907), vol. V, page 464.

As the power of Congress to *govern* the militia is restricted to "such part of them as may be employed in the service of the United States," it cannot extend to citizens not yet so "employed." The Selective Service Act does not by its terms justify such a construction. It is different from the Draft Act of 1863, which enacted "that all able-bodied citizens are hereby declared to constitute the national forces." It merely declares certain citizens "subject to draft into the forces hereby authorized, unless," etc.

It follows that the citizens whose liberties are affected are not yet in the military or naval forces of the United States, and the Federal Government has no power under the Constitution to deprive them of their right to resort to the judicial tribunals provided by law. The "boards" which Congress has attempted to authorize the President to establish, subject entirely to his will, are unconstitutional, both in the method of their establishment and their functions.

#### E. *It Deprives Citizens of the Due Process of Law.*

The act requires certain persons, under penalty, to register; it subjects those registered persons to the final decision of "boards" on whether they shall be forced into the military service or left free to follow their usual avocations; said "boards" are governed in their procedure, not by the rules of law, but by rules and regulations prescribed by the President. This clearly deprives such persons of their liberty without due process of law.

Constitution, Amendment V.

Due process of law means the same as "by the law of the land" in Magna Charta (*Murray's Lessee vs. Hoboken Land*

*Co., 18 How., 272).* Magna Charta, among other securities of rights and liberties, declares: "nor will we, (the king) proceed against him, nor send anyone against him by force of arms, unless according to the sentence of his peers, or by the law of the land." This should protect a citizen against the use of military power to deprive him of his personal liberty until after due process of law.

"The words 'by the law of the land' as used in the Constitution do not mean a statute passed for the purpose of working the wrong."

Cooley's Constitutional Limitations, 1st ed., chap. XI, page 354.

"They were intended to secure the individual from the arbitrary exercise of the powers of government; unrestrained by the established principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

*Yick Wo vs. Hopkins*, 118 U. S., 356, 369.

No statute could leave more "room for the play and action of purely personal and arbitrary power" than the Selective Service Act. It leaves to the President complete control of the "boards," their members, their rules of procedure, etc. It leaves him completely in control as to how many are to be drawn for military service, when, and who. In addition to all specified numbers, he may raise "such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength" and "such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary." He is to decide when to stop voluntary enlistments and resort to draft; he prescribes the regulations for the draft; the drafted ones are to serve for no fixed time, but for "the existing emergency," which presumably he is to determine the length of; as he prescribes the rules and regulations for the exemp-

tion boards which he creates, he may determine what religious sects are to be recognized as entitled to exemption and what not; he may draft for partial military service county and municipal officials, artificers, workmen, and other persons employed in the service of the United States, pilots, mariners, etc. He "may utilize the service" of any or all officers of the several States, etc., "and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or territory, to perform any duty in the execution of this act, are hereby required to perform such duty as the President shall order or direct," disobedience being made a misdemeanor.

If this be not leaving "room for the play and action of purely personal and arbitrary power," it is difficult to imagine what would be. A despot could ask no more. It makes no practical difference whether the depository be entitled King or President, the personal and arbitrary power at which Magna Charta and Amendment V were aimed is created by this act.

### *XII. Refusal of Examination of Jurors on Whether They Confused Socialists with Anarchists.*

In order to exercise their right of challenge, the defendants attempted to question the petit jury on their *voir dire*, to ascertain if they confused Socialists with anarchists. The court declined to allow this line of investigation.

This was error, as defendants were entitled to inquire into the fitness of the persons called.

*State vs. Steeves*, 29 Ore., 96.

*Hale vs. State*, 72 Miss., 140.

The defendants were Socialist party officials; their political activities were directly involved. The court was bound to take judicial notice of the fact that anarchists have been legislated against and are the subject of widespread popular



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disapprobation and prejudice. It was of extreme importance to the defendants, in the impassioned state of the public mind, that they ascertain beforehand and protect themselves by challenge in case any person drawn for jury service confused them with the anarchists.

Respectfully submitted,

JOSEPH W. SHARTS,  
MORRIS H. WOLF,  
*Attorneys for Plaintiffs in Error.*

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Office Supreme Court, U. S.

1917

DEC 10 1917

JAMES D. MAHER,  
CLERK.

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1917.

656 Ruthenberg *v.* United States.  
663 Arver *v.* United States.  
664 Grahle *v.* United States.  
665 Wangerin *v.* United States.  
666 Wangerin *v.* United States.  
680 Kramer *v.* United States.  
681 Kramer *v.* United States.  
702 Goldman *et al.* *v.* United States.  
738 Jones *v.* Perkins.

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### CASES INVOLVING THE CONSTITUTIONALITY OF THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE DRAFT ACT.

MOTION FOR LEAVE TO FILE THE FOLLOWING BRIEF PREPARED BY HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIAE AND AS COUNSEL FOR ROBERT COX, WHO, AS A MEMBER OF THE NATIONAL MILITIA, HAS BEEN CONSCRIPTED UNDER SAID ACT, AND AS SUCH IS NOW IN TRAINING AT CAMP FUNSTON, KANSAS, FOR MILITARY SERVICE BEYOND THE TERRITORIAL LIMITS OF THE UNITED STATES. COX, A NATIVE-BORN AMERICAN YOUTH, AFTER AFFIRMING THE VALIDITY OF THE ACT, AND EXPRESSING HIS WILLINGNESS TO SERVE HIS COUNTRY AT HOME, APPEALS TO THE COURT BY HABEAS CORPUS TO SECURE TO HIM THE EXEMPTION FROM SERVICE ABROAD EXPRESSLY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.



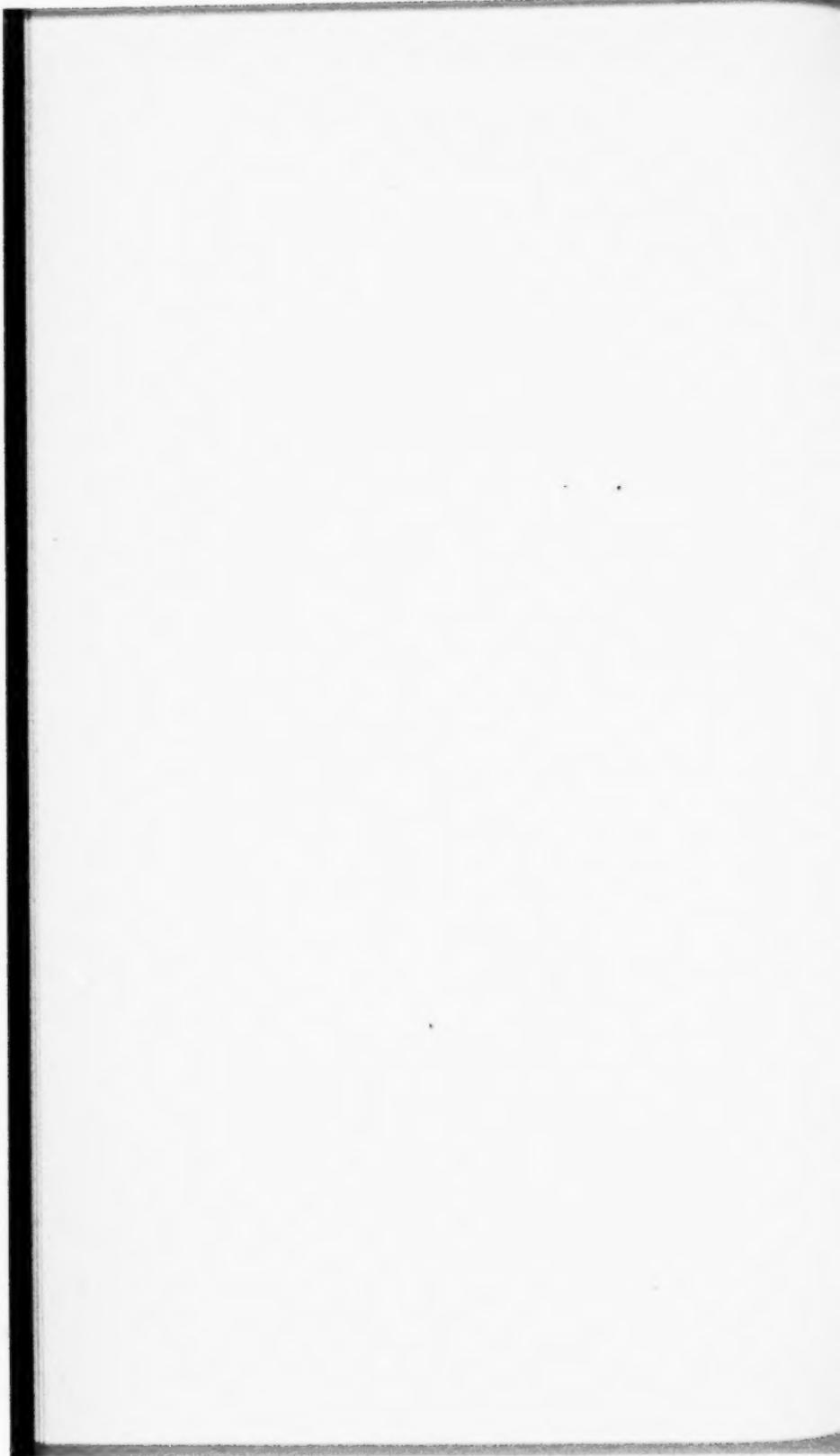
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1917.

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- 656. Ruthenberg *v.* United States.
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- 738. Jones *v.* Perkins.

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Cases involving the constitutionality of the Act of May 18, 1917, generally known as the Draft Act.

**MOTION OF HANNIS TAYLOR AND JOSEPH E. BLACK, AS AMICI CURIAE, AND AS COUNSEL FOR ROBERT COX, FOR LEAVE TO FILE A BRIEF IN SAID CAUSES.**

Now come Hannis Taylor and Joseph E. Black, members of the bar of this Court, as Amici Curiae, and as counsel for Robert Cox, whose petition for *habeas corpus* is now pending in the District Court of the United States for the District of Kansas, at Kansas City, in said District, where it has been set for hearing on December 8, 1917, before the Honorable John C. Pollock, the Judge of said Court. A copy of said petition is hereto annexed as Appendix A. Upon its face it appears that the petitioner, a native born citizen of Richmond, Missouri, after being being duly conscripted under the terms of said Act as a

member of the National Militia, has been placed for military training in Camp Funston, situated in the counties of Geary and Riley in said State of Kansas, where he is to be held in military custody by General Leonard Wood until some time in the near future, when he is to be transferred to the battlefields of Europe, presumably to France. Said petitioner, after affirming the constitutionality of said Act of May 18, 1917, and expressing his willingness to serve under it as a member of said National Militia whenever it is called upon "to execute the laws of the Union, suppress insurrections and repel invasions," sets up the constitutional immunity or exemption from military service beyond the territorial limits of the United States, guaranteed to him, in express terms, by the Constitution of the United States. As petitioner is informed by counsel that his right to such constitutional exemption or immunity depends upon whether or no he is a member of the National Militia called forth by Congress "to execute the laws of the Union, suppress insurrections and repel invasions," his case must be won or lost by the conclusions this Court may reach as to the constitutional powers of Congress to legislate upon this subject matter in the above stated cases to be argued on or about the 10th of December. His counsel therefore move this Honorable Court to permit them to file the brief hereto annexed in his behalf in the above stated causes. It is the purpose of counsel to make the case of Robert Cox a test case on this vitally important question. If his petition for *habeas corpus* is denied by the District Court of Kansas, his case will, with all convenient speed, be brought to this Court by a direct appeal.

Entirely apart from the foregoing ground the undersigned move the Court for leave to file the brief annexed hereto as *Amici Curiae* under the general discretion defined by it in *Northern Securities Company v. United*

States, 191 U. S. 555, in these terms: "And doubtless it is within our discretion to allow it [the filing of a brief by an *amicus curiæ* in a pending cause] *in any case when justified by the circumstances*. *Green v. Biddle*, 8 Wheat. 17; *Florida v. Georgia*, 17 How. 491; the *Gray Jacket*, 5 Wall. 370." As this Court knows, hundred of thousands, perhaps millions, of the younger citizens of the United States are vitally interested in the constitutional exemption or immunity set up by Robert Cox. His case therefore affects a large part of our population; it is of supreme interest to countless American households. Certainly such a nation-wide question should not be passed upon by this Court, even indirectly, without the most exhaustive argument, oral and written, at its bar. Therefore the undersigned appeal to the broad discretion of this Court, *entirely apart from any consent of counsel in pending cases*, to permit them to file the brief annexed hereto, not only as counsel for Robert Cox, but as *Amici Curiae* for the hundreds of thousands of American citizens standing in his shoes.

HANNIS TAYLOR,  
JOSEPH E. BLACK,  
*As Counsel for Robert Cox*  
*and as Amici Curiae.*

## APPENDIX A.

## PETITION FOR WRIT OF HABEAS CORPUS.

In the District Court of the United States for the District of Kansas.

UNITED STATES OF AMERICA.

In the matter of Robert Cox, Ray County, Missouri, unlawfully detained and restrained of his liberty at Camp Funston in the Counties of Geary and Riley in the State of Kansas, by General Leonard Wood, the military commander thereof—the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

Your petitioner, Robert Cox, humbly petitioning, showeth unto the Court as follows:

1. That your petitioner, having been born in the State of Missouri on the 31st day of August, 1895, is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed, as he is informed and believes, under that part of Sec. 8, Art. I, of the Constitution of the United States which provides that "The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia, for any one or all of the three purposes which the Constitution specifies.

2. That your petitioner further avers that he is advised and believes, and so charges, that he cannot be lawfully called upon to serve for any other purposes, that he cannot

be lawfully called upon as one conscripted under said Act to render military service beyond the territorial limits of the United States. Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said drafted National Militia "across the seas," neither has it manifested any consciousness, by any positive utterance, that any such unprecedented act would be attempted by any one. Petitioner avers that in what is known as his Flag Day address, the President of the United States solemnly and truthfully declared that "American armies were never before sent across the seas."

3. That it is the constitutional right and immunity of your petitioner to be exempt, as a member of said conscripted National Militia, from service beyond the territorial limits of the United States, because, as he is informed and believes, and so charges, that such constitutional right and immunity, solemnly defined in Sec. 8, Art. I, of the Constitution, was recognized and affirmed by the Supreme Court of the United States in 1827; by Attorney General Wickersham in an official opinion, dated February 17, 1912, and by President Wilson, in four speeches delivered in January and February, 1916.

4. That despite such constitutional right and immunity from service abroad, your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States, for the express, declared and unlawful purpose of being transported to the battlefields of Europe in open defiance of the Constitution of the United States. As early as July 16, 1917 (see Congressional Record of July 20, 1917, pp. 5864-5), the Secretary of War made a formal declaration

of the fact that not only the State Militia (now called the National Guard), but also the National Militia (now called the National Army) were to be sent to France with all convenient speed. Among other things the Secretary of War then said: "It is intended to send the National Guard, or such units thereof as are properly equipped and trained, to join the American expeditionary force in France before the additional forces authorized by the act above, now called the National Army, can be sent. When the plans for mobilizing these two forces were drawn it was not known how soon the National Army could be assembled under the draft." Your petitioner avers that since that date the conscripted National Militia (now called the National Army in order to conceal its real character) has been duly drafted, and is now being concentrated in camps to be therein detained for a few months prior to its transportation to the battlefields of Europe, under purely executive orders, to be made in open defiance of the Constitution of the United States. Your petitioner further avers that neither the American electorate nor the American Congress has ever spoken one word, indicating the desire, that the National Militia should be sent to the battlefields of Europe. Neither the electorate nor the Congress has authorized the Executive power to make any such order or orders, expressly forbidden by the Constitution of the United States.

5. That your petitioner is now unlawfully detained and restrained of his liberty at Camp Funston by the military power of the United States, because he is so detained and restrained for the sole, only and declared purpose of being transported very soon to the battlefields of Europe, under void Executive orders to be made by the Secretary of War in open defiance of the Constitution of the United States. That your petitioner will surely be so transported unless he is delivered by the order of this Honorable Court from such unlawful custody. Your petitioner further

avers that as the military commander of said Camp Funston is now General Leonard Wood, your petitioner is now detained by General Leonard Wood and restrained by him in the manner above set forth.

Wherefore, in consideration of the premises, your petitioner prays that a writ of habeas corpus may be granted and issued forthwith to the said General Leonard Wood, directing him to bring and have the body of your petitioner before this Honorable Court, or any Judge thereof, at a time and place in said writ to be specified to do and receive what shall then and there be considered by the Court concerning the time and cause of detention of your petitioner, and concerning the said writ, and that your petitioner may be restored to his liberty. And for such other and further relief as the nature of the petition may require.

HANNIS TAYLOR, (Signed) ROBERT COX,  
JOSEPH E. BLACK, *Petitioner.*

*Attorneys for Petitioner.*

STATE OF KANSAS  
COUNTY OF RILEY } ss.

Robert Cox, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition, and that he has read the same; that the matters and things therein alleged are true, except as to matters and things as are therein stated to be alleged on information and belief, and that, as to such, he believes them to be true.

(Signed) ROBERT COX.

Subscribed and sworn to before me this 2d day of November, 1917.

My term will expire March 22, 1921.

(Signed) T. W. SCOTT,  
[SEAL] *Notary Public.*

T. W. SCOTT, *Notary Public,*  
*Riley County, Kansas.*

## NOTICE

*To the Honorable, the Attorney General of the United States; to the Honorable, the Solicitor General of the United States, Washington, D. C.; to C. S. Darrow, Chicago, Ill., Latimer & Latimer, Minneapolis, Minn.; H. F. O'Neill, 140 Nassau Street, New York; J. Gordon Jones, Cordele, Ga.*

You are hereby notified that the undersigned, as counsel for Robert Cox, and as *Amici Curiae*, on Monday, the 10th day of December, 1917, will on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit the foregoing motion to grant to them leave to file in the above stated causes numbered 656, 663, 664, 665, 666, 680, 681, 702, 738, in which you are counsel of record, a brief as counsel for Robert Cox and as *Amici Curiae* for the reasons stated in the foregoing motion.

HANNIS TAYLOR,  
JOSEPH E. BLACK.

Service of the foregoing notice of motion, with the said motion and brief therein referred to, is hereby acknowledged this — day of December, 1917.

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1917.

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- 656. *Ruthenberg v. United States.*
- 663. *Arver v. United States.*
- 664. *Grahl v. United States.*
- 665. *Wangerin v. United States.*
- 666. *Wangerin v. United States.*
- 680. *Kramer v. United States.*
- 681. *Kramer v. United States.*
- 702. *Goldman, et al., v. United States.*
- 738. *Jones v. Perkins.*

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Brief offered by Hannis Taylor and Joseph E. Black, members of the Bar of this Court, as *amici curiæ*, concerning the constitutional questions involved in these cases, arising, as they do, out of the Act of May 18, 1917, generally known as the Draft Act, leave having been asked to file such brief for the reasons stated in the foregoing motion.

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**IS THE ACT OF MAY 18, 1917, GENERALLY KNOWN AS THE  
DRAFT ACT, A CONSTITUTIONAL AND VALID LAW?**

Since the foundation of this Government only two conscription acts have been enacted by the Congress of the United States; the first, the Act of March 3, 1863, entitled, "*An Act for enrolling and calling out the National Forces, and for other purposes;*" the second, the Act of May 18, 1917, entitled, "*An Act to authorize the President*

*to increase temporarily the Military Establishment of the United States.*" For the convenience of the Court these acts—the only two conscription acts ever enacted by the Congress of the United States—have been printed in parallel columns in Appendix B hereto. In the preamble of the Act of March 3, 1863, the clear and positive declaration is made that it was enacted under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, *suppress insurrections and repel invasions.*" The terms of the preamble are these:

Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government to SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore, etc.

So clear was it to the jurists and statesmen of that epoch that the Congress, when it deems it necessary, under Section 8, Article I, of the Constitution, to call forth the *National Militia* (it can call forth no other) "to execute the laws of the Union, suppress insurrections and repel invasions," *may do so by conscription*—no real contest of the right was made by any one. Certainly no attempt was ever made to challenge the constitutionality of the Conscription Act of March 3, 1863, in this Court.

ACT OF MAY 18, 1917, A SUBSTANTIAL REPRODUCTION OF THE ACT OF MARCH 3, 1863, SO FAR AS CONSCRIPTION IS CONCERNED. It is certainly a notable fact that the *National Militia*—a creation of the Federal Convention of 1787—was never called into existence until the Act of March 3, 1863, “called it forth” by conscription. An *insurrection* had to be put down; the regular army of the United States, resting exclusively on the volunteer principle, and the systems of state militia, resting on the same principle, were inadequate to the occasion. The contingency contemplated by Section 8, Article I, had arrived. The *National Militia* was therefore called out to *put down an insurrection*. After the lapse of fifty-four years the *National Militia* was called forth a *second time* by the Conscription Act of May 18, 1917, “to execute the laws of the Union, suppress insurrections and *repel invasions*.” Is it strange that, under such circumstances, the Congress, with *only one precedent of conscription to guide it*, should have made the Act of May 18, 1917, a substantial reproduction of the Act of March 3, 1863, *so far as conscription is concerned*? That all important *record fact* is manifest on the face of the two acts printed in parallel columns in Appendix B. The absence of a preamble in the Act of May 18, 1917, in nowise weakens the fact its subject-matter so clearly establishes. *The Court will observe that the act last named never intimates, directly or indirectly, in any part of it that the conscripts who are “called forth” by it are to be used outside of the territorial limits of the United States.* It does not attempt to authorize such a use, or to vest in the President the power so to employ them. No one, therefore, has the right to charge or even to intimate that when Congress called forth the *National Militia* by conscription in the Act of May 18, 1917, it had the slightest idea that it would be used for any except the three purposes expressly defined in Section 8, Article I. The pur-

pose of this brief is to demonstrate (1) that the Conscription Act in question is constitutional and valid because it was enacted by Congress, as the Act of March 3, 1863, was enacted, under Section 8, Article I, of the Constitution, which provides that "The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" (2) that if such Act of May 18, 1917, can not be upheld by virtue of that clause, it is null and void.

**THE MILITIA AS A NATIONAL DEFENSE FORCE THE OLDEST ELEMENT IN THE ENGLISH CONSTITUTIONAL SYSTEM.**

The ancient landfyrd, the militia of the English shire, is as old as the shire system itself. From the earliest times in England the obligation of military service for the protection of the State rested upon every freeman, *who could be forced to perform it by law*. That obligation was embodied in the inevitable *trinoda necessitas*, which consisted of military service in the field, and in the repair of bridges and fortresses. "This common burden was the *trinoda necessitas* in its origin required of all people, not resting on land, and therefore, not the subject of immunity." *Essays in Anglo-Saxon Law*, p. 61. See also Digby, *Law of Real Property*, p. 22. *The right to conscript the militia for home defense is as old as English law itself.* The militia thus drawn from the shires was the only military force that Alfred the Great could "call forth" against the Danes; it was the only military force that Harold could "call forth" to oppose the Norwegians in the great fight at Stamfordbridge; it was the only military force that Harold could "call forth" to oppose the Normans. Harold lost the battle of Hastings because the "main forces [militia] of Northumberland and northwestern Mercia came not to King Harold's muster." Freeman, *Norm. Conq.*, iii, p. 282. The county military system, known as the militia, survived the Norman Conquest unimpaired.

Stubbs, *Select Charters*, pp. 153-4. By the great statute of I Edw. III, c. 5, *purely declaratory*, it was provided that the militia could only be used at home for national defense, "*as has been used in times past for the defense of the realm.*" Down to 1786, the year before the meeting of the Federal Convention, it was not legally possible to take the English militia over the border into Scotland. In 1786 that was made possible by the Act of 26 Geo. III, c. 107, Sec. 95, concerning the militia, in which it was provided that "*neither the whole nor any part shall be ordered out of Great Britain.*" In the words of the Enc. Brit. (9 ed.): "The Militia of the United Kingdom consists of a number of officers and men maintained for the purpose of augmenting the military strength of the country in case of imminent national danger or great emergency. In such a contingency the whole or any part of the Militia is liable, by proclamation of the sovereign, TO BE EMBODIED, *that is to say, placed in active service within the confines of the United Kingdom.*" Mr. Dicey, one of the most eminent, certainly the most business-like and practical commentator on the modern English constitution, says in his edition of 1908: "*EMBODIMENT indeed converts the militia for the time being into a regular army, THOUGH AN ARMY WHICH CAN NOT BE REQUIRED TO SERVE ABROAD.*"

Thus the fact is put beyond all question that down to 1908 the English Constitution forbade, *as it had for a thousand years*, the transportation of the militia abroad even after it was "*embodied*," that is, converted "*for the time being into a regular army.*" Dicey, *The Law of the Constitution*, pp. 287-8. AND SO, AFTER THE PRESENT WAR BEGAN, THE ENGLISH CONSTITUTION HAD TO BE ALTERED BY PARLIAMENT BEFORE ANY PART OF THE MILITIA COULD BE SENT ACROSS THE CHANNEL TO FRANCE—SOMETHING THAT HAD NEVER HAPPENED BEFORE IN ENGLISH HISTORY.

**ORIGIN AND GROWTH OF ENGLISH MILITARY FORCES FOR SERVICE ABROAD.**

England never had a military force that could be sent abroad until William the Conqueror brought such a force with him in the feudal host of professional soldiers who accompanied him. It was the duty of that host, which simply supplemented the ancient constitutional force known as the militia, "to attend the king in war, within and without the realm, mounted and armed, during the regular term of service." But as that regular term of service only lasted for forty days, it led to the device known as scutage or shield-money, which produced a fund with which the crown could employ mercenary and professional soldiers—volunteers—who could be sent abroad and kept there by contract. Out of that *purely voluntary system* of paid military service was evolved the regular or standing army of England as it existed at the date of our severance from the mother country; and upon the same general basis rested the standing and professional naval force of England at that time.

**THE REGULAR ARMY AND NAVY SYSTEMS OF ENGLAND, PURELY VOLUNTARY, REPRODUCED BY THE FEDERAL CONVENTION OF 1787.**

When the question of creating a military system arose in the Federal Convention of 1787, there seems to have been no real controversy as to the basis upon which our regular army—volunteer army—and navy—volunteer navy—should be organized. As the regular army and navy of England then rested strictly on the volunteer system we simply reproduced that system in those provisions of the Constitution which, for convenience, will be called **GROUP A, ESTABLISHING A REGULAR ARMY AND NAVY.** The Convention of 1787, after giving to Congress the power "to declare war," provided, Section 8, Article I,

that "The Congress shall have power . . . to raise and support armies, but no appropriation of money to that use shall be for longer than two years [the English Mutiny Act of 1689]; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces." Those three provisions, grouped together as a connected whole, relate solely and exclusively to one subject matter—the creation, maintenance and government of the regular army and navy of the United States, which is now and has always been maintained "*by voluntary enlistment*." This basic fact is perfectly well known even to professional soldiers who are not lawyers. General Upton, in speaking of the provisions in question, in his *Military Policy of the United States*, p. 79, says: "Here was laid the foundation of the *volunteer system*, which attained its fullest development during our long civil war. The 'levies,' known later as 'volunteers,' were authorized under the *plenary power of Congress to raise and support armies*,' and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' were *wholly distinct from the militia or State troops*.'" For a century and a quarter Congress has been giving a practical construction to the constitutional clauses embraced in Group A, by *raising, supporting and governing* under them the regular army and navy of the United States as *volunteer systems, entirely separate and apart from the militia systems, National and State*.

**BITTER OPPOSITION IN THE CONVENTION OF 1787 TO THE CREATION OF A NATIONAL MILITIA ENTIRELY INDEPENDENT OF THE STATES.**

Each of the original thirteen States organized bodies of State militia after the English model. "Militia musters" became the rule in the States as in the mother country.

But when the Convention of 1787 met those who may be called the Nationalists, with Washington at their head, contending that the State military had proven to be "*inefficient under the Confederation*," demanded the creating of a *National Militia system*, entirely apart from the State systems, which should be under the exclusive control of the new Federal Government. See Madison Papers, p. 730 and p. clxxxii, Gilpin ed. The proposal to create a national militia was made by George Mason, who, on August 18, "introduced the subject regulating the militia. He thought such a power necessary to be given to the general government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The militia ought, therefore, to be the more effectually prepared for the public defense. Thirteen States will never concur in any one system, if the disciplining of the militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as select militia." In supporting Mason's proposition Pierce Butler "urged the necessity of submitting the whole militia to the general authority, which had the care of the general defense; and Charles Pinckney, in contending that "Congress should have power to regulate the militia," said: "For a part to be under the general and a part under the State governments would be an incurable evil. He saw no room for such distrust of the general government." John Langdon next arose and said: "He saw no more reason to be afraid of the general government than of the State governments. He was more apprehensive of the confusion of the different authorities on the subject, than of either." The last word in favor of the creation of a National Militia was then spoken by James Madison, who said he "thought the regulation of the militia naturally appertained to the authority charged with the public defense. It did not seem, in its nature, to be

divisible between two distinct authorities. If the States would trust the general government with the power over the public treasure, they would, from the same consideration of necessity, grant it the direction of the public force. Those who had a full view of the public situation would, from the sense of the danger, guard against it. The States would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other." In the course of the debate "General Pinckney mentioned a case, during the war, in which a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. *The States would never keep up a proper discipline of the militia.*" Madison Papers, pp. 1355-1363.

The opposition to the creation of a National Militia was led by Gerry, who "was against letting loose the myrmidons of the United States on a State without its own consent." In opposing the new creation he said he "thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the States have not." Dickinson, with equal vehemency, said: "We are come now to a most important matter—that of the sword. His opinion was that the States never would, nor ought to, give up all authority over the militia. He proposed to restrain the general power to one-fourth part at a time, which by rotation would discipline the whole militia." In a more conservative temper Ellsworth said he "was for going as far, in submitting the militia to the general government, as might be necessary. . . . The whole authority over the militia ought by no means to be taken away from the States, whose consequence would pine away

to nothing after such a sacrifice of power. He thought the general authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. *It must be vain to ask the States to give the militia out of their hands.*" Madison Papers, pp. 1350-1362.

Thus was the issue sharply defined in the Convention between two factions—the States rights faction contending, in the words of Ellsworth, that it was "vain to ask the States to give the militia out of their hands;" the Nationalists urging, in the words of Pierce Butler, "the necessity of submitting the whole militia to the general authority which had the care of the general defense." The deadlock which thus arose was broken on this, as on many other occasions, by a compromise arranged by a grand committee of the States. (Elliot, V 445.) The partial victory won by the States rights faction was embodied in the concession that the States should continue to retain their militia systems, *subject to a certain degree of Federal control.* That concession was thus expressed in what will be called Group B: "The Congress shall have power . . . to provide for organizing, arranging, and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

By that concession thus made to the States rights party in the Convention of 1787, under which the continued existence of the State militia was guaranteed, subject to a certain amount of Federal control—the Nationalists purchased the right to have a National militia, *to be created by Congress*, entirely free from State control. That concession was thus expressed in what will be called Group C: "The Congress shall have power . . . to provide

for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions."

The first time Congress ever exercised that power was when it "called forth" the National Militia under the Conscription Act of March 3, 1863, for the expressly declared purpose of suppressing an insurrection.

The second time Congress exercised that power was when it "called forth" the National Militia under the Conscription Act of May 18, 1917, a substantial reproduction of the first, *so far as conscription is concerned*. As there is no preamble to the last act the National Militia (*euphoniously styled a National Army in order to obscure its real character*), so called forth may be used "to execute the laws of the Union, suppress insurrections and repel invasions," but for no other purposes.

In limiting the use of the National Militia to the three purposes just stated the Convention had of course uppermost in its mind *the exemption of the English militia from service abroad*, which had been a vital part of the English constitution for a thousand years prior to our severance from the mother country. Every member of the Convention knew that the English militia could not be taken across the Channel, that it could only be used **AT HOME** "to repel invasions." Therefore that ancient formula was transplanted into the Constitution of the United States in the belief, no doubt, that every school boy in the land would understand its meaning and its history.

#### THE FIRST RECOGNITION BY THIS COURT OF TWO DISTINCT SYSTEMS OF MILITIA, ONE STATE, ONE NATIONAL.

When this subject came for the first time before this Court in *Houston v. Moore*, 5 Wheat. 7, the two distinct systems of militia—the one created and maintained by the States, the other created and maintained by the Federal Government—were recognized and defined in terms so clear

and distinct as to preclude all doubt upon the subject. Mr. Hopkins for the plaintiff in error said in his brief: "The power to govern the militia thus called forth, and employed in the service of the United States, is exclusively in the National Government. *A National Militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government,*" citing *Livingston v. Van Ingen*, 9 Johns. Rep. 507, 565, 575. In accepting that view, and in drawing the line between the new national militia and the pre-existing State militia, the Court said: "But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the [State] Militia have been called forth and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. *Over the national militia, the State governments never had, nor could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none can exist.* . . . It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, the other under the authority of the United States."

In analyzing this case it is all-important to remember that the question directly involved was *the construction of the Act of February 28, 1795*. As stated by the Court itself: "The act of 2d of May, 1792, which is reenacted almost *verbatim* by that of the 28th of February, 1795, authorizes the President of the United States, in case of

invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth **SUCH NUMBER OF THE MILITIA OF THE STATES** [there were no attempts in those early days to *create a national militia as such*] most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officers of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops."

**THE FIRST RECOGNITION BY THIS COURT OF EXEMPTION FROM SERVICE ABROAD.**

The case of *Houston v. Moore* was followed in due time by that of *Martin v. Mott*, 12 Wheat. 19 (1827), in which a new question, involving the construction of the Act of February 28, 1795, was presented here. That new question was this: Was an exclusive authority vested in the President to decide whether the exigencies had actually arisen, which were contemplated in the Constitution, and in said Act of 1795, authorizing him to call forth the State militia to execute the laws of the Union, suppress insurrections and repel invasions?" In reaching the conclusion that the exclusive authority so to decide was vested in the President, this Court settled a graver question. *It decided that State militia in the service of the United States, as well as national militia, are exempt from service abroad.* In the words of the Court: "The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action *before the invader himself has reached the soil.* . . . A free people are naturally jealous of the exercise of mili-

tary power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without corresponding responsibility. *It is, in its terms, A LIMITED POWER, confined to cases OF ACTUAL INVASION, OR OF IMMINENT DANGER OF INVASION.*" And so, this Court gave in 1827 a lucid and comprehensive definition of the ancient English formula "*to repel invasions.*" Then it was settled once for all that the militia of the United States, no matter whether State or national, can only be called forth to "*repel invasions;*" and that "*the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.*" IN OTHER WORDS, AN INVASION CAN ONLY BE REPELLED BY MEN STANDING ON THE SOIL OF THEIR OWN COUNTRY.

**THE MOTIVE THAT PROMPTED THE FIRST ATTEMPT TO DESTROY THE EXEMPTION FROM SERVICE ABROAD ESTABLISHED BY SEC. 8, ART. I, OF THE CONSTITUTION.**

Eighty years after this Court had, in *Martin v. Mott*, 12 Wheat. 19, 27, solemnly affirmed the exemption of the militia, State and national, from service abroad, certain lawless people, who claimed that such exemption had become an inconvenience by reason of the territorial expansion, incident to the Spanish-American War, undertook to destroy it by Congressional legislation. With that end in view, the Act of January 21, 1903, was amended by the Act of March 27, 1908, in such a way as to provide that "*the militia so called shall continue to serve during the term so specified, either within OR WITHOUT THE TERRITORY OF THE UNITED STATES.*"

By that stupid device such evil-minded persons attempted to make Congress confer upon the President the power to rob the militia of its constitutional exemption from service abroad, in defiance of the elementary principle that the legislative department of the government can-

not confer upon the Executive a power it is expressly forbidden to exercise itself. When such device was submitted by President Taft to Attorney General Wickersham, a learned lawyer, with a thorough knowledge of English and American constitutional law, he trampled upon it in an elaborate official opinion delivered under his oath of office and dated February 17, 1912, in which, among other things, he said:

"The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the general government, except to suppress insurrection, repel invasions, or to execute the laws of the Union. . . . This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom. Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body. . . . If authority is needed for the conclusion here reached, the following may suffice: In *Ordroneaux, Constitutional Legislation*, page 501, it is said:

"The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and, third, to repel invasions.

"These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered **ONLY UPON THE SOIL OF THE UNITED STATES OR OF ITS TERRITORIES.** . . . **IN THE HISTORY OF THIS PROVISION OF THE CONSTITUTION THERE IS NOTHING INDICATING THAT IT WAS EVEN CONTEMPLATED THAT SUCH TROOPS SHOULD BE EMPLOYED FOR PURPOSES OF OFFENSIVE WARFARE OUTSIDE THE LIMITS OF THE UNITED STATES.** And it is but just to infer that the enumera-

tion of the specific occasions on which alone the militia can be called into the service of the general government was intended as a distinct limitation upon their employment."

And in Von Holtz, Constitutional Law, page 170, it is said, "the militia cannot be taken out of the country."

It is true that the Act of January 21, 1903, as amended by the Act of March 27, 1908 (35 Stat. 399), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia to be employed in the service of the United States he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. **CONGRESS CAN NOT BY ITS OWN ENACTMENT ENLARGE THE POWER CONFERRED UPON IT BY THE CONSTITUTION; AND IF THIS PROVISION WERE CONSTRUED TO AUTHORIZE CONGRESS TO USE THE ORGANIZED MILITIA FOR ANY OTHER THAN THE THREE PURPOSES SPECIFIED, IT WOULD BE UNCONSTITUTIONAL.**

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, **IT FORBIDS SUCH USE FOR ANY OTHER PURPOSE;** and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

TO THE SECRETARY OF WAR.

After citing in that opinion the decisions of the Supreme Court of the United States (*Houston v. Moore*, 5 Wheat. 1, and *Martin v. Mott*, 12 Wheat. 19, 27) as irrevocably settling the exemption of the militia from service abroad, the Attorney General exposed, with striking emphasis, the emptiness of the stupid contention that, *although the Congress is expressly forbidden to authorize the sending of the militia, National or State, abroad, it may authorize the President to do so.* Speaking of the act before him which attempted to authorize the President to use the militia "either within or without the territory of the United States," he said: "*If this provision were construed to authorize Congress to use the organized militia for any other than the three purposes specified, it would be unconstitutional.*" Thus, in advance, he put the stamp of nullity upon any clause or phrase in the Conscription Act of May 18, 1917, which may be so construed as to express such an unconstitutional purpose.

**EXEMPTION IN QUESTION AGGRESSIVELY AFFIRMED BY PRESIDENT WILSON IN 1916.**

After the foregoing opinion of Attorney General Wickersham had become the law of the Department of Justice, and as such binding in this vital matter upon President Wilson, he affirmed it, with great emphasis, in four speeches delivered in January and February, 1916, when he was called upon to explain why he could do no more for the development of the State militia, now euphoniously called the National Guard.

In an address delivered at New York, January 27, 1916, he said: "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm of our national defense should be built up and encouraged to the utmost; but, you know, gentlemen, that under the Constitu-

*tion of the United States* the National Guard is under the direction of more than twoscore States; that it is not permitted to the National Government directly to have a voice in its development and organization; and that only upon occasion of **ACTUAL INVASION** has the President of the United States the right to ask those men to leave their respective States." In an address delivered at Cleveland, Ohio, January 29, 1916, he said: "The President of the United States has not the right to call on these men [the National Guard] except in the case of *actual invasion*, and, therefore, no matter how skillful they are, no matter how ready they are, they are not the instruments for immediate National use." In an address delivered at Milwaukee, January 31, 1916, he said: "The National Guard, fine as it is, is not subject to the orders of the President of the United States. It is subject to the orders of the governors of the several States, and the *Constitution* itself says that the President has no right to withdraw them from their States even, except in the case of *actual invasion of the soil of the United States*." In an address delivered at Topeka, Kansas, February 2, 1916, he said: "The *Constitution* of the United States puts them [the National Guard] under the direct command and control of the governors of the States, not of the President of the United States, and the *national authority* has no right to call upon them for any service outside their States unless the *territory of the Nation* is **ACTUALLY INVADED**."

Thus it appears (1) that in 1827 this Court in a unanimous judgment declared that the militia, State and National, can only be used for one of the three purposes clearly defined in Sec. 8, Art. I, of the Constitution; that to "repel invasions" means "to provide the requisite force for action, before the invader himself has reached the soil;" or, in the words of Ordronaux, "the services required of the militia can be rendered only upon the soil of the United States or its Territories;" (2) that in 1912, when the expan-

sionists, after the Spanish-American War, attempted to destroy the Constitutional exemption by Congressional legislation, the entire subject was examined by Attorney General Wickersham who trampled upon the stupid device then invented, declaring that the militia, both State and National, is exempt from service abroad; "that the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (3) that President Taft, an eminent and experienced constitutional lawyer, at whose instance the Wickersham opinion was prepared, accepted its conclusions as final and unquestionable; (4) that in 1916 President Wilson, recognizing the Wickersham opinion as the law of the Department of Justice and as such binding upon him, solemnly reaffirmed its conclusions in four speeches, now in print, delivered in the months of January and February, 1916.

**THE FATHERS SO CONSTRUCTED OUR UNIQUE FEDERAL CONSTITUTION AS TO MAKE US THE STRONGEST OF NATIONS, FOR THE PURPOSES OF NATIONAL DEFENSE, AND THE WEAKEST, FOR THE PURPOSES OF FOREIGN AGGRESSION.**

This Court's judicial knowledge, as defined by itself, embraces the entire field occupied by our constitutional and political history, embracing also matters of geography, *Keene v. McDonough*, 8 Pet. 398; *Bank of Augusta v. Earle*, 13 Pet. 519; *The Divina Pastora*, 4 Wheat. 52; *Brown v. Piper*, 91 U. S. 37; *Prize Cases*, 2 Black, 635; *Sparrow v. Strong*, 3 Wall. 97; *U. S. v. Jackson*, 104 U. S. 41; *Neely v. Henkel*, 180 U. S. 109. This Court therefore knows judicially that the rock upon which our constitutional life is founded had carved upon it by the fathers themselves this fundamental maxim, "*Never entangle ourselves in the broils of Europe; never suffer Europe to intermeddle with cis-Atlantic affairs.*" In obedience to its own rules this Court must keep constantly before its eyes that fundamental maxim in solving the questions of

constitutional law involved in this case. Just as this Court knows judicially all the historical causes which led up to the Civil War (*Cuyler v. Ferrill*, 6 Fed. Cas. No. 3, 523, 1 Abb. 169), it knows judicially all the historical causes that led up to the making of the existing Constitution of the United States. But so perfectly is the fundamental maxim just stated known of all men—laymen and lawyers, civilians and soldiers—that it will only be necessary to offer in support of it a lucid little book, entitled "*Our Military History, Its Facts and Fallacies*," published in 1916 by a distinguished and law-loving soldier, General Leonard Wood, who now has in his military custody Robert Cox. In his "Foreword" the author says: "Our policy is not one of aggression, but one which looks only to a secure defense. Consequently the arrangements for our military establishment should be limited to the needs of *a secure and certain national defense against foes which may be brought against us.*" After reviewing the histories of the War of the Revolution and the War of 1812, the author says that we have been compelled to fight all our wars **WITH VOLUNTEERS**, "*because the militia was not available for service outside of the United States.*" He then adds that we had so to conduct the Mexican War "*where the militia could not be used because of the constitutional limitation upon its employment outside of the United States*" (pp. 145-146).

**THE SUDDENLY CONSTRUCTED AND PREPOSTEROUS CONTENTION THAT, IN OPEN DEFIANCE OF THE LONG-SETTLED CONSTITUTIONAL EXEMPTION OF THE MILITIA, STATE AND NATIONAL, FROM SERVICE ABROAD, IT MAY BE SENT TO THE BATTLEFIELDS OF EUROPE BY A MERE MILITARY ORDER OF THE PRESIDENT OF THE UNITED STATES.**

Our entire fabric of civil liberty rests upon the principle that this is a government of law "as contradistinguished to a government of functionaries." (Lieber, *Civil Liberty and Self-Government*, p. 91.) A famous commentator on

the English Constitution has said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." (Dicey, *The Law of the Constitution*, p. 183.) In *United States v. Lee*, 106 U. S. 196, this Court, speaking in thunder tones through Mr. Justice Miller, said: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creations of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, *but also upon rights in controversy between them and the Government*, and the docket of this Court is crowded with controversies of the latter class."

Inflamed by the passions of war, and apparently unmindful of the Constitution as expounded by this Court and by the Department of Justice, certain persons, **WHO DO NOT DARE TO PROPOSE AN AMENDMENT OF THE CONSTITUTION**, are now maintaining that the National Militia, *lawfully con-*

*scripted and assembled in camps for the highly patriotic purpose of "repelling invasions,"* may, by a mere Executive order, be transported over thousands of miles of sea to the battlefields of Europe in open defiance of the constitutional exemption from military service abroad. The President himself has stated in a solemn address that "*American armies were never before sent across the seas;*" this Court knows judicially that neither the American people nor the American Congress have uttered one word authorizing the sending of American armies "*across the seas.*" How to give even color or semblance of legality to such a revolutionary proposal has taxed to the utmost the ingenuity of the inventors of the startling proposal in question. Without having seen the Government's brief in these cases, we understand that it will be contended here that the National Militia now in camps was not called forth by Congress under that part of Sec. 8, Art. I, which authorizes that body "*To provide for calling forth the [National] Militia to execute the laws of the Union, suppress insurrections and repel invasions,*" but under that part of Sec. 8, Art. I, which authorizes Congress "*To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years*" [the English Mutiny Act, by which the standing army of Great Britain, *composed of volunteers*, can be dissolved annually by Parliament. The most notable sponsor for the new theory has stated it in this form: "While the President is Commander in Chief, in the Congress resides the authority 'to raise and support armies' and, 'to provide and maintain a navy,' and, 'to make rules for the government and regulation of the land and naval forces,' and as a safeguard against military domination, the power to raise and support armies is qualified by the provision that 'no appropriation of money to that use shall be for a longer term than two years.' *Otherwise this power is unlimited.*" We will undertake to

expose the utter emptiness of that incongruous jumble of ideas, without any historical or logical basis whatever, in the following order:

1. Under a fundamental canon of construction, recognized from the beginning by this Court, every part of the Constitution which is taken directly from the English is interpreted in the light of its history in the mother country. When in the trial of Burr, for treason, it became necessary for Chief Justice Marshall to define the meaning of the term "levying war" as used in Art. III, Sec. 3, he said: "But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. *It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it.*" This Court has reiterated that obvious and necessary rule in *Rhode Island v. Mass.*, 12 Pet. 657; *Income Tax Cases*, 157 U. S. 429; *U. S. v. Wong Kim Ark*, 169 U. S. 279; and very recently in *Gompers v. United States*, 233 U. S. 604, in which this Court, speaking through Mr. Justice Holmes, has well said: "But the provisions of the Constitution are not mathematical formulas having their essence in their form; *they are organic, living institutions transplanted from English soil.*" And so when the Convention of 1787 determined to vest in Congress the power to create a regular or standing army *on the volunteer system*, in exact imitation of the English regular or standing army, resting then as now on the *volunteer system*, it vested in it the power "To raise and support [volunteer] armies, *but no appropriation of money to that use shall be for a longer term than two years.*" If anything is needed to make what has been said conclusive it is supplied by that part of this provision in *italics* which is simply a reproduction of the

English Mutiny Act of 1689 by which Parliament can dissolve the regular or standing army of England, composed of volunteers, whenever it sees fit. Knowing that it is only authorized to "raise and support [volunteer] armies" under the clause in question, Congress has for an hundred and twenty-five years "raised and supported" the regular or VOLUNTEER army of the United States by legislation passed under that provision. So notorious is that fact, that even professional soldiers, not jurists, are perfectly familiar with it. In referring to the constitutional provision in question, in his *Military Policy of the United States*, p. 79, Upton says: "Here were laid the foundations of the volunteer system, which attained its fullest development during our long Civil War. The 'levies,' known later as 'volunteers,' were authorized under the plenary power of Congress to 'raise and support armies,' and the power of appointing these officers was given the President, to whom it obviously belonged, as the 'levies' were wholly distinct from the militia." This Court will see at a glance that the provision in question, with the English Mutiny Act in its stomach, under which Congress has always "raised and supported" the volunteer armies of the United States, has no more connection with the enactment of the Conscription Act of May 18, 1917, than a clause taken from the Talmud or Pentateuch. The grotesque theory, suddenly resurrected as a war measure to defeat the constitutional exemption of the National Militia from service abroad, does not rise to the dignity of an argument.

2. There is no basis of fact whatever for the imputation that when Congress enacted the Conscription Act of May 18, 1917, it attempted to draw its power to do so, not from the clause authorizing it "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," upon which was based, in express terms, the Conscription Act of March 3, 1863, but

from the clause authorizing it "To raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years." To prevent any possible misconception on that branch of the subject the two acts—*the only conscription acts ever passed by Congress*—have been printed in parallel columns in Appendix B hereto. The Court will see at a glance that the Conscription Act of May 18, 1917, is not only a substantial but a close reproduction of the Conscription Act of March 3, 1863, *so far as the conscription clauses are concerned*. Here the fact must be kept steadily in view that the Conscription Act of May 18, 1917, under which the National Militia is now being drafted, is not an original measure; *as appears upon its face it is simply an extension or supplement to carry into effect the National Defense Act of June 3, 1916*. By Sec. 57 of that Act the National Militia is thus defined:

"COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, AND SAID MILITIA SHALL BE DIVIDED INTO THREE CLASSES, THE NATIONAL GUARD, THE NAVAL MILITIA, AND THE UNORGANIZED MILITIA."

The primary and avowed purpose of the Conscription Act of May 18, 1917, is to organize "*the Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . between the ages of twenty-one and thirty years." Thus the fact is fixed with mathematical certainty that the Act of May 18, 1917, was passed in order to call out the National Militia, as such, "to execute the laws of the Union, suppress insurrections and repel invasions," first,

because it is really little more than a copy of the first conscription act of March 3, 1863; second, because its avowed purpose is to organize the "*Unorganized Militia*" of the United States by extending its provisions to "all male citizens or male persons not alien enemies . . . between the ages of twenty-one and thirty years." Even a struggle of despair cannot justify the attempt to deny that the Conscription Act of May 18, 1917, was passed under that part of Sec. 8, Art. I, which authorizes Congress to call out the National Militia to "execute the laws of the Union, suppress insurrections and repel invasions."

3. In conclusion, let this question be asked and answered: Did it ever enter into the mind of an American legislator to propose in the Congress of the United States a *conscription law* under that clause of the Constitution which authorizes that body "To raise and support armies," *so that those so conscripted could be incorporated in the ranks of the regular or volunteer army and taken with it beyond the territorial limits of the United States?* Yes, such a measure was offered in the House of Representatives during the War of 1812; and on December 9, 1814, Daniel Webster crushed it in an oration that will live forever. The great orator in describing the character of the act said: "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the Army, *for the general purposes of the war*, under color of a military service.

. . . The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution—'to repel invasion, suppress insurrection, or execute the laws.' . . . The only section which would have confined the services of the militia proposed to be raised, within the United States, has been stricken out, and if the President should not march them into the Provinces

of England at the North, or of Spain at the South, it will not be because he is prohibited by any provision in this Act . . . *What is this, Sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require?* . . . In the present want of men and money, the Secretary of War has proposed to Congress a Military Conscription. For the conquest of Canada the people will not enlist, and if they would the treasury is exhausted and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming the reluctance to the Service, and of subduing the difficulties which arise from the deficiencies of the exchequer. **THE ADMINISTRATION ASSERTS THE RIGHT TO FILL THE RANKS OF THE REGULAR ARMY BY COMPELSION.** . . . Congress having, by the Constitution, *a power to raise armies*, the Secretary contends that no restraint is to be imposed on the exercise of this power, except such as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers by any means it chooses, unless such means are particularly prohibited."

Here we have, in all its grandeur, the pending contention that under the clause that authorizes Congress "*To raise and support armies*"—that is, regular armies based on the volunteer system—a conscription act may be passed to "*fill the ranks of the Regular Army by compulsion*," such conscripts as a part of the Regular Army being subject of course to service abroad.

In trampling the life out of that deadly assault upon the Constitution he loved so well Webster said: "On the issue of this discussion, I believe the fate of this Government may rest. Its duration is incompatible, in my opinion, with the existence of the measures in contemplation. A crisis has at last arrived, to which the course of things has long tended, and which may be decisive upon

the happiness of present and future generations. If there be anything important in the concerns of men, the considerations which fill the present hour are important. I am anxious above all things to stand acquitted before God, and my conscience, and in the public judgments, of all participation in the counsels which have brought us to our present condition and which now threaten the dissolution of the Government. When the present generation of men shall be swept away and that this Government ever existed shall be a matter of history only, I desire that it may then be known that you have not proceeded in your course unadmonished and unforewarned. Let it then be known that there were those who would have stopped you in the career of your measures, and held you back, as by the skirts of your garments, from the precipice, over which you are plunging, and drawing after the Government of your country. . . .

*"It is time for Congress to examine and decide for itself. It has taken things on trust long enough. It has followed Executive recommendation till there remains no hope of finding safety in that path. . . ."*

"Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, *at home or abroad, for defense or for invasion*, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to Government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.

"Is this, Sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of

this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasures and their own blood a Magna Charta to be slaves. Where is it written in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in? Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, but whenever the purposes of an ambitious and mischievous government may require it?

"If the Secretary of War has proved the right of Congress *to enact a law enforcing a draft of men out of the militia into the Regular Army*, he will at any time be able to prove quite as clearly that Congress has power to create a Dictator. The arguments which have helped him in one case will equally help him in the other."

Thus it appears that the chimerical theory—based upon the assumption that Congress, under the power to "raise and support [volunteer] armies," may conscript into the Regular Army from the militia soldiers, *who may thus be defrauded of their constitutional exemption from service abroad*—is an ancient device constructed during the War of 1812, and trampled to death by Daniel Webster on December 9, 1814. Those who are now striving to lift this dead heresy out of the forgotten grave in which it has slept from that day to this should be careful to explain its paternity.

**THE GRAVITY OF THE QUESTION PRESENTED BY THE CASE OF ROBERT COX.**

It is impossible to exaggerate the gravity of the question presented by the case of Robert Cox, a native born American youth, who, while affirming the validity of the act under which he has been conscripted, appeals to this Court to secure to him the exemption from military service beyond the territorial limits of the United States solemnly guaranteed by that clause of the Constitution under which the act in question was passed. His case thus involves, first, the oldest and most fundamental right known to English and American constitutional law; second, it involves the lives of hundreds of thousands, perhaps millions, of American youths who, if this sacred right is ignored, may be driven to the battlefields of Europe by a mere Executive order made in open defiance of the Constitution of the United States. Certainly this Court will not pass upon such a momentous question, involving the lives and liberties of hundreds of thousands of American citizens, without exhaustive argument, oral and written, at its bar. The case of Dred Scott involved only the making of slaves freemen; the case of Robert Cox involves, if the foregoing views of Webster are sound, the making of freemen slaves.

All of which is most respectfully submitted.

HANNIS TAYLOR,

JOSEPH E. BLACK,

*As Amici Curiæ and as*

*Counsel for Robert Cox.*

## APPENDIX B.

### THE ONLY TWO CONSCRIPTION LAWS EVER ENACTED BY THE CONGRESS OF THE UNITED STATES.

*The second, the Act of May 18, 1917, is a substantial reproduction of the first, the Act of March 3, 1863, so far as conscription is concerned.*

#### *The Act of March 3, 1863*

*An Act for enrolling and calling out the national Forces, and for other Purposes.*

Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government to SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore—

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.*

SEC. 2. *And be it further enacted, That the following persons be, and they are hereby, excepted and exempt from the provisions of this act, and shall not be liable to military duty under the same, to wit: Such as are rejected as physically or mentally unfit for the service; also, First the Vice-President of the United*

#### *The Act of May 18, 1917*

*An Act to authorize the President to increase temporarily the Military Establishment of the United States.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—*

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness requisite for permanent appointment.

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with

States, the judges of the various courts of the United States, the heads of the various executive departments of the government, and the governors of the several States. Second, the only son liable to military duty of a widow dependent upon his labor for support. Third, the only son of aged or infirm parent or parents dependent upon his labor for support. Fourth, where there are two or more sons of aged or infirm parents subject to draft, the father, or, if he be dead, the mother, may elect which son shall be exempt. Fifth, the only brother of children not twelve years old, having neither father nor mother dependent upon his labor for support. Sixth, the father of motherless children under twelve years of age dependent upon his labor for support. Seventh, where there are a father and sons in the same family and household, and two of them are in the military service of the United States as non-commissioned officers, musicians, or privates, the residue of such family and household, not exceeding two, shall be exempt. And no persons but such as are herein excepted shall be exempt: *Provided*, however, That no person who has been convicted of any felony shall be enrolled or permitted to serve in said forces.

SEC. 3. *And be it further enacted*, That the national forces of the United States not now in the military service, enrolled under this act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of twenty and thirty-five years, and all unmarried persons subject to do military duty above the age of thirty-five and under the age of forty-five; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the service of the United States until those of the first class shall have been called.

SEC. 4. *And be it further enacted*, That, for greater convenience in enrolling, calling out, and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each territory of the United States shall constitute one or more, as the

terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: *Provided further*, That the President is authorized to increase or decrease the number of organ-

President shall direct, and each congressional district of the respective states, as fixed by a law of the state next preceding the enrolment, shall constitute one: *Provided*, That in states which have not by their laws been divided into two or more congressional districts, the President of the United States shall divide the same into so many enrolment districts as he may deem fit and convenient.

SEC. 5. *And be it further enacted*, That for each of said districts there shall be appointed by the President a provost-marshall, with the rank, pay, and emoluments of a captain of cavalry, or an officer of said rank shall be detailed by the President, who shall be under the direction and subject to the orders of a provost-marshall-general, appointed or detailed by the President of the United States, whose office shall be at the seat of government, forming a separate bureau of the War Department, and whose rank, pay, and emoluments shall be those of a colonel of cavalry.

SEC. 6. *And be it further enacted*, That it shall be the duty of the provost-marshall-general, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates; to furnish them with the names and residences of all deserters from the army, or any of the land forces in the service of the United States, including the militia, when reported to him by the commanding officers; to communicate to them all orders of the President in reference to calling out the national forces; to furnish proper blanks and instructions for enrolling and drafting; to file and preserve copies of all enrolment lists; to require stated reports of all proceedings on the part of his subordinates; to audit all accounts connected with the service under his direction; and to perform such other duties as the President may prescribe in carrying out the provisions of this act.

SEC. 7. *And be it further enacted*, That it shall be the duty of the provost-marshals to arrest all deserters, whether regulars, volunteers, militiamen, or persons called into the service under this or any other act of Congress, wherever they may be found, and to send them to the nearest military commander or military post; to detect, seize, and confine

izations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: *Provided further*, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: *Provided further*, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: *Provided further*, That the President in his discretion may organize for each division one armored motor car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: *And provided further*, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: *Provided further*, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section in addition to and for each of the above forces such recruit training units as he may

spies of the enemy, who shall without unreasonable delay be delivered to the custody of the general commanding the department in which they may be arrested, to be tried as soon as the exigencies of the service permit; to obey all lawful orders and regulations of the provost-marshal-general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.

SEC. 8. *And be it further enacted*, That in each of said districts, there shall be a board of enrolment, to be composed of the provost-marshal, as president, and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practising physician and surgeon.

SEC. 9. *And be it further enacted*, That it shall be the duty of the said board to divide the district into sub-districts of convenient size, if they shall deem it necessary, not exceeding two, without the direction of the Secretary of War, and to appoint, on or before the tenth day of March next, and in each alternate year thereafter, an enrolling officer for each sub-district, and to furnish him with proper blanks and instructions; and he shall immediately proceed to enroll all persons subject to military duty, noting their respective places of residence, ages on the first day of July following, and their occupation, and shall, on or before the first day of April, report the same to the board of enrolment, to be consolidated into one list, a copy of which shall be transmitted to the provost-marshal-general on or before the first day of May succeeding the enrolment: *Provided*, nevertheless, That if from any cause the duties prescribed by this section cannot be performed within the time specified, then the same shall be performed as soon thereafter as practicable.

SEC. 10. *And be it further enacted*, That the enrolment of each class shall be made separately, and shall only embrace those whose ages shall be on the first day of July thereafter between twenty and forty-five years.

SEC. 11. *And be it further enacted*, That all persons thus enrolled shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United

deem necessary for the maintenance of such forces at the maximum strength.

Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries, battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided.

Seventh. The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this Act: *Provided*, That the organization of such force shall be the same as that of the corresponding organization of the Regular Army: *And provided further*, That there shall be no enlistments in a force of men under twenty-five years of age at time of enlisting: *And provided further*, That no such volunteer force shall be accepted in any unit smaller than a division.

SEC. 2. That the enlisted men required to raise and maintain the organization of the Regular Army and to complete and maintain the organizations bodying the members of the National Guard drafted into the service of the United States, at the maximum strength as by this Act provided, shall be raised by voluntary enlistment, or if whenever the President decides that it can not effectively be so raised or maintained, then by selective draft; and other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively, but this provision shall not prevent transfer to any force of training cadets from other forces. Such draft as hereinafter provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty and thirty years, both inclusive, and shall

States, and to continue in service during the present rebellion, not, however, exceeding the term of three years; and when called into service shall be placed on the same footing, in all respects, as volunteers for three years, or during the war, including advance pay and bounty as now provided by law.

SEC. 12. *And be it further enacted*, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district the number of men to be furnished by said district; and thereupon the enrolling board shall, under the direction of the President, make a draft of the required number, and fifty per cent. in addition, and shall make an exact and complete roll of the names of the persons so drawn, and of the order in which they were drawn, so that the first drawn may stand first upon the said roll, and the second may stand second, and so on; and the persons so drawn shall be notified of the same within ten days thereafter, by a written or printed notice, to be served personally or by leaving a copy at the last place of residence, requiring them to appear at a designated rendezvous to report for duty. In assigning to the districts the number of men to be furnished therefrom, the President shall take into consideration the number of volunteers and militia furnished by and from the several states in which said districts are situated, and the period of their service since the commencement of the present rebellion, and shall so make said assignment as to equalize the numbers among the districts of the several states, considering and allowing for the numbers already furnished as aforesaid and the time of their service.

SEC. 13. *And be it further enacted*, That any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procurement of such substitute; which sum shall be fixed at a uniform rate by a general order made at the time of ordering a

take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas for the several States, Territories, and the District of Columbia, or subdivision thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: *Provided*, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

SEC. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the

draft for any state or territory; and thereupon such person so furnishing the substitute, or paying the money shall be discharged from further liability under that draft. And any person failing to report after due service of notice, as herein prescribed, without furnishing a substitute, or paying the required sum therefor, shall be deemed a deserter, and shall be arrested by the provost-marshall and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrolment shall relieve him from the draft.

SEC. 14. *And be it further enacted*, That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon of the board, who shall truly report to the board the physical condition of each one; and all persons drafted and claiming exemption from military duty on account of disability, or any other cause, shall present their claims to be exempted to the board, whose decision shall be final.

SEC. 15. *And be it further enacted*, That any surgeon charged with the duty of such inspection who shall receive from any person whomsoever any money or other valuable thing, or agree, directly or indirectly, to receive the same to his own or another's use for making an imperfect inspection or a false or incorrect report, or who shall wilfully neglect to make a faithful inspection and true report, shall be tried by a court-martial, and, on conviction thereof, be punished by fine not exceeding five hundred dollars nor less than two hundred, and be imprisoned at the discretion of the court, and be cashiered, and dismissed from the service.

SEC. 16. *And be it further enacted*, That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; and all drafted persons reporting at the place of rendezvous shall be allowed travelling pay from their places of residence; and all persons discharged at the place of rendezvous shall be allowed travelling pay to their places of residence; and all expenses connected with the enrolment and draft, including subsistence while at the rendezvous,

United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

SEC. 4. That the Vice-President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots, mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of

shall be paid from the appropriation for enrolling and drafting, under such regulations as the President of the United States shall prescribe; and all expenses connected with the arrest and return of deserters to their regiments, or such other duties as the provost-marshall shall be called upon to perform, shall be paid from the appropriation for arresting deserters, under such *such* regulations as the President of the United States shall prescribe: *Provided*, The provost-marshals shall in no case receive commutation for transportation or for fuel and quarters, but only for forage, when not furnished by the government, together with actual expenses of postage, stationery, and clerk hire authorized by the provost-marshall-general.

SEC. 17. *And be it further enacted*, That any person enrolled and drafted according to the provisions of this act who shall furnish an acceptable substitute, shall thereupon receive from the board of enrolment a certificate of discharge from such draft, which shall exempt him from military duty during the time for which he was drafted; and such substitute shall be entitled to the same pay and allowances provided by law as if he had been originally drafted into the service of the United States.

SEC. 18. *And be it further enacted*, That such of the volunteers and militia now in the service of the United States as may reënlist to serve one year, unless sooner discharged, after the expiration of their present term of service, shall be entitled to a bounty of fifty dollars, one-half of which to be paid upon such reënlistment, and the balance at the expiration of the term of reënlistment; and such as may reënlist to serve for two years, unless sooner discharged, after the expiration of their present term of enlistment, shall receive, upon such reënlistment, twenty-five dollars of the one hundred dollars bounty for enlistment provided by the fifth section of the act approved twenty-second of July, eighteen hundred and sixty-one, entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property."

SEC. 19. *And be it further enacted*, That whenever a regiment of volunteers of the same arm, from the same State, is re-

the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: *Provided*, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the Presi-

duced to one-half the maximum number prescribed by law, the President may direct the consolidation of the companies of such regiment: *Provided*, That no company so formed shall exceed the maximum number prescribed by law. When such consolidation is made, the regimental officers shall be reduced in proportion to the reduction in the number of companies.

SEC. 20. *And be it further enacted*, That whenever a regiment is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number.

SEC. 21. *And be it further enacted*, That so much of the fifth section of the act approved seventeenth July, eighteen hundred and sixty-two, entitled, "An act to amend an act calling forth the militia to execute the laws of the Union," and so forth, as requires the approval of the President to carry into execution the sentence of a court-martial be, and the same is hereby repealed, as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offences may be carried into execution upon the approval of the commanding general in the field.

SEC. 22. *And be it further enacted*, That courts-martial shall have power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks or to serve three years or during the war.

SEC. 23. *And be it further enacted*, That the clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, furnished as aforesaid, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized

dent to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, or the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision.

Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of

to receive the same; and the possession of any such clothes, arms, military outfits, or accoutrements, by any person not a soldier or officer of the United States, shall be *prima facie* evidence of such a sale, barter, exchange, pledge, loan, or gift, as aforesaid.

SEC. 24. *And be it further enacted*, That every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such; or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and he shall be imprisoned not exceeding two years nor less than six months.

SEC. 25. *And be it further enacted*, That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost-marshall, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments.

SEC. 26. *And be it further enacted*, That immediately after the passage of this act, the President shall issue his procla-

the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

SEC. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

mation declaring that all soldiers now absent from their regiments without leave may return within a time specified to such place or places as he may indicate in his proclamation, and be restored to their respective regiments without punishment, except the forfeiture of their pay and allowances during their absence; and all deserters who shall not return within the time so specified by the President shall, upon being arrested, be punished as the law provides.

SEC. 27. *And be it further enacted*, That depositions of witnesses residing beyond the limits of the state, territory, or district in which military courts shall be ordered to sit, may be taken in cases not capital by either party, and read in evidence; provided the same shall be taken upon reasonable notice to the opposite party, and duly authenticated.

SEC. 28. *And be it further enacted*, That the judge advocate shall have power to appoint a reporter, whose duty it shall be to record the proceedings of and testimony taken before military courts instead of the judge advocate; and such reporter may take down such proceedings and testimony in the first instance in short-hand. The reporter shall be sworn or affirmed faithfully to perform his duty before entering upon it.

SEC. 29. *And be it further enacted*, That the court shall, for reasonable cause, grant a continuance to either party for such time and as often as shall appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

SEC. 30. *And be it further enacted*, That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state,

*further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

SEC. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who in any manner, shall fail or neglect fully

territory, or district in which they may have been committed.

SEC. 31. *And be it further enacted*, That any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties prescribed by law or a court-martial, forfeit all pay or allowances during such absence.

SEC. 32. *And be it further enacted*, That the commanders of regiments and of batteries in the field, are hereby authorized and empowered to grant furloughs for a period not exceeding thirty days at any one time to five per centum of the non-commissioned officers and privates, for good conduct in the line of duty, and subject to the approval of the commander of the forces of which such non-commissioned officers and privates form a part.

SEC. 33. *And be it further enacted*, That the President of the United States is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft, in the manner provided for in this act.

SEC. 34. *And be it further enacted*, That all persons drafted under the provisions of this act shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require.

SEC. 35. *And be it further enacted*, That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men.

SEC. 36. *And be it further enacted*, That general orders of the War Department, numbered one hundred and fifty-four and one hundred and sixty-two, in reference to enlistments from the volunteers into the regular service, be, and the same are hereby, rescinded; and hereafter no such enlistments shall be allowed.

SEC. 37. *And be it further enacted*, That the grades created in the cavalry forces

to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

SEC. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this Act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

of the United States by section eleven of the act approved seventeenth July, eighteen hundred and sixty-two, and for which no rate of compensation has been provided, shall be paid as follows, to wit: Regimental commissary the same as regimental quartermaster; chief trumpeter the same as chief bugler, sad[d]ler-sergeant the same as regimental commissary-sergeant; company commissary-sergeant the same as company quartermaster's sergeant: *Provided*, That the grade of supernumerary second lieutenant, and two teamsters for each company, and one chief farrier and blacksmith for for each regiment, as allowed by said section of that act, be, and they are hereby, abolished; and each cavalry company may have two trumpeters, to be paid as buglers; and each regiment shall have one veterinary surgeon, with the rank of a regimental sergeant-major, whose compensation shall be seventy-five dollars per month.

SEC. 38. *And be it further enacted*, That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.

APPROVED, March 3, 1863.

SEC. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grade as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grade in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense Act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grade in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

SEC. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service, and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any com-

missioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

SEC. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service *in the Regular Army*; and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is \$24, an increase of \$12 per month; those whose base pay is \$30, \$36, or \$40, an increase of \$8 per month; and those whose base pay is \$45 or more, an increase of \$6 per month: *Provided*, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

SEC. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

SEC. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided*, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for mili-

tary purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both.

Sec. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both.

Sec. 14. That all laws and parts of laws in conflict with the provisions of this Act are hereby suspended during the period of this emergency.

APPROVED, May 18, 1917.

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CLERK

**SUPREME COURT  
OF THE UNITED STATES**

**OCTOBER TERM, 1917**

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**No. 656**

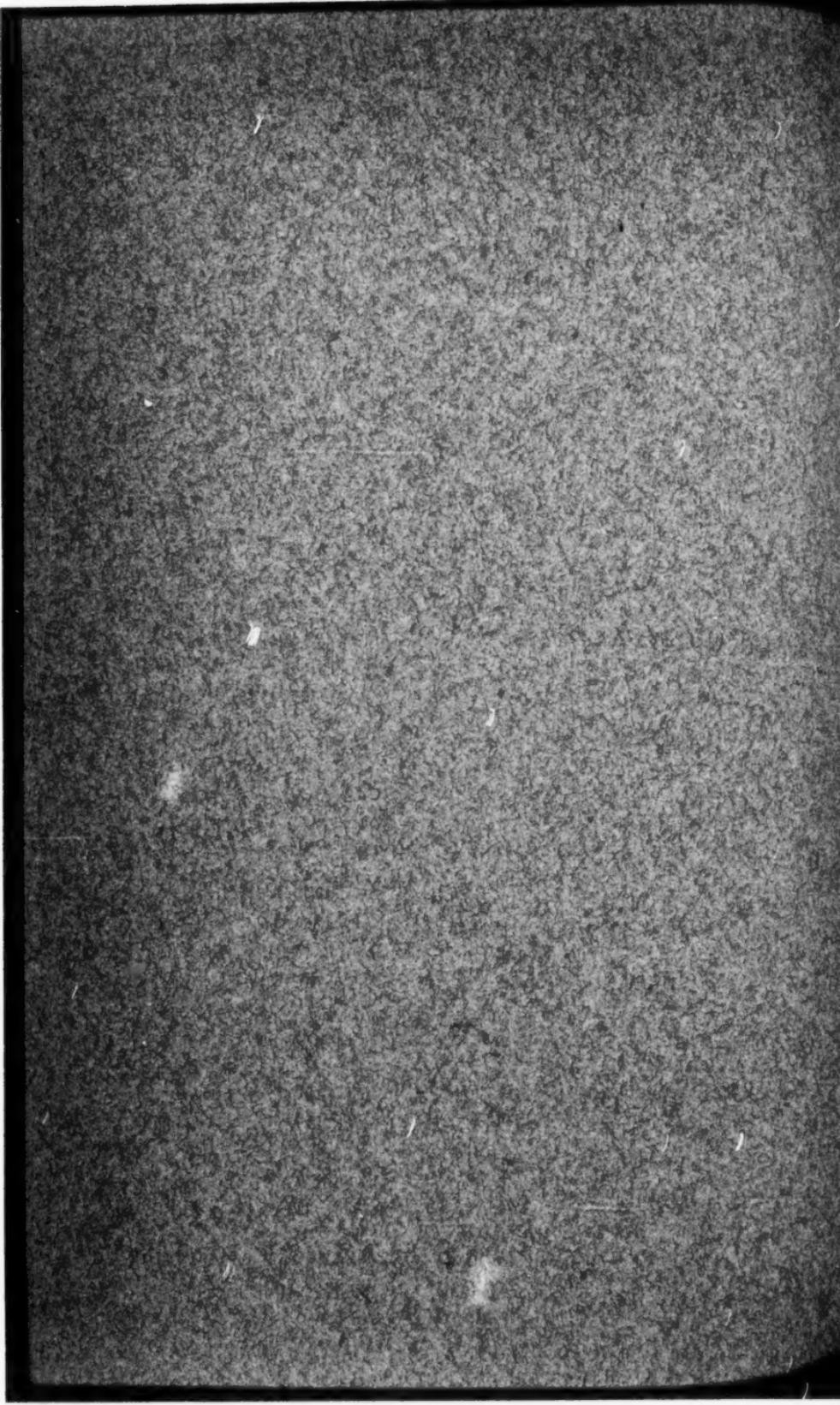
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**CHARLES E. RUTHENBERG, ALFRED WAGEN-KNECHT, AND CHARLES BAKER, PLAINTIFFS IN ERROR,**

**vs.**

**THE UNITED STATES OF AMERICA,  
DEFENDANT IN ERROR.**

**AND EIGHT OTHER CAUSES, Nos. 663, 664, 665, 666, 669, 671,  
702 AND 738.**



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Since many briefs are before the Court in these cases, there is no intention of repeating in this one any comprehensive general demonstration of the unconstitutionality of the Conscription Act. Its purpose is to present separately and distinctly a case against the Act from the point of view of

those who object to participation in this war on grounds of conscience.

Of course there are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man. In each class individual views vary as widely as individual powers of coherent statement. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. Norman M. Thomas clearly stated it in an article entitled "War's Heretics," which appeared in the August 11, 1917, issue of the *Survey*:

"In short, conscientious objectors include Christians, Jews, agnostics and atheists; economic conservatists and radicals; philosophic anarchists and orthodox socialists.

"It is not fair, therefore, to think of the conscientious objector simply as a man who with a somewhat dramatic gesture would save his own soul though liberty perish and his country be laid in ruins. I speak with personal knowledge when I say that such an attitude is rare. Rightly or wrongly, the conscientious objector believes that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."

Millions of Americans would find it impossible to believe, even if this Court should so hold, that our fundamental law secures no place in democracy for persons of such conviction. It lies deep in the moral foundations of every one who has been an American schoolboy that the cardinal excellence of our government is that it assures, to all men at all times, freedom—which, to mean anything, must mean freedom to believe as individual judgment and conscience may direct, and, within certain limits of public morals, to govern conduct accordingly. The Constitution expresses the guaranty of such

freedom both indirectly, by recognizing the retention by the people of their unenumerated natural rights (Amendment IX), and directly, by forbidding Congress to make laws prohibiting the free exercise of religion (Amendment I).

The Conscription Act, by constraining violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or their duty towards Man.

(a) *The Inadequacy of the Provision of the Conscription Act for the Exemption of so-called "Religious" Objectors.*

The Conscription Act provides for the *partial* exemption of a small fraction of the "religious" conscientious objectors:

"Nothing in this act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized or existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant."

Act of May 18, 1917, Sect. 4.

In the eighteenth or early nineteenth centuries it might have been reasonable to hold negligible for practical purposes such religion as was not connected with "any well-recognized religious sect or organization at present organized and existing." Nearly every one's sacred beliefs had relation with a Deity, and nearly every one adhered to the forms and tenets of some well-recognized sect or organization.

But now for a long time this has not been so. Our period is often thought of as one in which organized religions tend to decay and disappear. Old organizations such as Roman Catholicism and evangelistic and Protestant bodies here and there, and new ones such as Mormonism and Christian Science, demonstrate a surviving power over conduct and conscience. But the time when the religious devotion of *all* men, or even of *most*, submitted as a matter of course to organized guidance has long since passed. Churches founded by the grandfathers of men who fought at Lexington no longer even open their doors on Sunday for congregations which would not come. To maintain nominal connection with an hereditary religious establishment is no longer important even to respectability.

That religion has tremendously overflowed, even if it has not yet quite obliterated, the boundaries of organized sects, would hardly be debatable even had it never been authoritatively declared. It was so declared by this Court as early as 1889, though Congress in 1917 seems unaware of it. Justice Field, in *Davis vs. Beason*, 133 U. S., 342, said:

"It" (referring to *religion*) is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment . . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others."

The inadequacy of the exemption clause in the Conscription Act is apparent. The Act effectually denies free exercise of religion even to devout persons who regard non-participa-

tion in the war as among the duties imposed by their relations with their Maker, *unless* they happen to be members of a particular sect which includes pacifism in its *cultus*. And even if they belong to such a sect, their right to free exercise of religion is at the discretion of the President.

(b) *Free Exercise of Religion in its Broader Aspect.*

Many persons who base conscientious objection to military service squarely upon the duties imposed by their relations to their Maker are now in jail or the cantonments. Such persons, however, are only part of those whose fundamental beliefs are outraged by the Conscription Act. The Constitution protects these others, too, even though Justice Field's definition is not, literally construed, broad enough to cover them.

Justice Field's definition was accurate for practical purposes only so long as the custom was still general of weaving matters of right and wrong into relation with the will and purposes of a putative Maker. God was commonly supposed, for example, to have views upon such matters as dancing and card-playing. Though intelligent men may have laughed at such crudities, they were neither shocked nor surprised by them. The personal imminence of a Maker was taken for granted.

The twentieth century, however, must and does recognize that religion can surpass and omit all notion of relations with a Maker. For much religion nowadays has done more than escape from churches. It has escaped also from theology. It is still possible for Billy Sunday to state that Jesus hates a pacifist. But many men take responsibility for their beliefs themselves instead of putting it upon a deity.

Do beliefs so self-shouldered lose sanctity? Must the conduct which flows from them do without the constitutional protection which would unquestionably attach were they arbitrarily associated with divine revelation?

"He believes in No-God, and he worships him," said a colleague of mine of a student who was manifesting a fine atheistic ardor; and the most fervent opponents of Christian doctrine have often enough shown a temper which, psychologically considered, is indistinguishable from religious zeal."

William James, *The Varieties of Religious Experience*, page 35.

It is the psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.

The framers knew something of fanaticism, intolerance and persecution. They realized that under stress of conviction as to matters of pre-eminent import, even the wisest, most sincere and most humane sometimes lose sight of their own human fallibility and see no wrong in forcing others to walk in paths of which they themselves feel sure. And they intended that under a government founded upon the proposition that men are entitled to life, liberty, and happiness if they can find it, no man's soul should be shamed or aroused as, for example, a Roman Catholic's would be by statutory compulsion to defile the image of the Virgin. They were dealing for time to come with matter of substance, not with externalities. At a time when Protestant Christianity was practically universal, contemporary utterances as to freedom of conscience were naturally as a rule colored by allusions to the church and the Deity. But these utterances clearly intimate that the substance of freedom of conscience was perceived and intended. Jefferson, for example, in his address to the Danbury Baptist Association (8 Jefferson's Works, 13; quoted in *Reynolds vs. U. S.*, 98 U. S., 145, at 164), said this (italics ours):

"Believing with you that religion is a matter which lies solely between man and his God; that he owes

account to none other for his faith and worship; *that the legislative powers of the government reach actions only, not opinions*,—I contemplate with sovereign reverence that act of the whole American people which declared that their Congress should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation *in behalf of the rights of conscience*, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties.”

Chief Justice Waite's interpretation of this utterance is as follows:

“Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. *Congress was deprived of all legislative power over mere opinion*, but was left free to reach actions which were in violation of social duties or subversive good order.”

Another statement of Jefferson's (1 Works, 45; also quoted in *Reynolds vs. U. S.*, at page 163) is still more clear-cut and illuminating. This was in the preamble to the Virginia bill “for establishing religious freedom,” which he drew in 1785:

“To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty.”

The view that the framers of the Constitution meant to protect the *right to think and believe*, regardless of association

with church or Deity, is thus supported by contemporary evidence as well as by sensible inference. And since a man's religion is thus in effect synonymous with the beliefs he holds sacred, an *exercise of religion* occurs whenever he does or refrains from doing anything whatever by reason of belief and under penalty of spiritual self-disgrace.

The religious character of faith or conduct is not affected by its reasonableness or probable or possible rightness. Faith springing from instinct, tradition, or superstition may be as sacred as that which springs from the reasoning processes of well-informed intelligence. For, since everything human is fallible, there is no authoritative criterion of the rightness of anything. The blindest arbitrary assumption has at least the chance of being as right as reason. For reason itself in the last analysis only guesses. It guesses not only at conclusions of conduct, but also at the diagnosis of determining conditions and the appraisal of the relative weight of facts—as for example those bearing upon the precise nature and proximity and relative seriousness of foreign and domestic menaces of oppression or military autocracy.

The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces.

American participation in the war is superlatively an exercise of religion in this sense. The depth and fervor of conviction in ordinary men and women as well as in the President and other statesmen must at times move even those who profoundly disagree.

Conscientious refusal to take part in the war is equally an exercise of religion. He who believes in democracy and more democracy as the means of carving out for populations as well as for favored individuals the possibility of good lives, and at the same time feels that the progress of the democracy in which he believes will be thwarted instead of served by the

war, may believe that he cannot put on a uniform and go out to kill and die without a shame at least as deep as that of his fellow citizen whose spirit was abased because America held off for so long. And the shame of both is the same kind of shame as that of the Protestant renegade who denied his faith at the doors of the Inquisition.

It is recognized that the right to conform conduct to conscience is subject to the limitation declared in the Mormon cases—that the conduct must not be such as to outrage the moral sense of the community. Works of death in general shock that moral sense. That is why passionate advocates of war were on their part denied free exercise of religion until the Act of Congress, declaring war, had changed morality.

Can it be that this Act of Congress has not only changed, but completely reversed morality? It will not be held that views shared in December, 1916, with a President whose authority to represent the moral sense of the people had just been demonstrated by an election, have become so outrageous that their holders are outlawed, and must now submit as their various temperaments may direct to such processes of extinction as the mobs and governments of their country shall from time to time administer.

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#### CONCLUSION.

At this time of hyper-religious intensity of faith and feeling, it has been seriously advanced by eminent men, without thought of disrespect, that it may be a "higher duty" of this Court, under some sort of "unwritten law," to disregard the Constitution. Ex-Senator Elihu Root, for example, in an address before the Conference of Bar Associations (reprinted in the West Publishing Company's Docket for November, 1917) said this:

"What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. This has to be vested in the military commander in order to carry on war successfully. *You cannot have free democracy and successful war at the same moment.* The inevitable conclusion is that, if you have to live in the presence of a great, powerful military autocracy as your neighbor, you cannot maintain your democracy."

There is no reason why the answer which this Court gave to such reasoning in Civil War times should not hold now:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of the government. Such a doctrine leads directly to anarchy or despotism."

*Ex Parte Milligan*, 4 Wall, 2.

The time has not come yet for America to declare that freedom is a failure.

Respectfully submitted,

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## SELECTIVE DRAFT LAW CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

CHARLES E. RUTHENBERG, ALFRED WAGENKNECHT, AND CHARLES BAKER,  
PLAINTIFFS IN ERROR, } No. 656.  
v.  
THE UNITED STATES OF AMERICA. }

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO.*

JOSEPH F. ARVER, PLAINTIFF IN ERROR, } No. 663.  
v.  
THE UNITED STATES OF AMERICA. }

ALFRED F. GRAHL, PLAINTIFF IN ERROR, } No. 664.  
v.  
THE UNITED STATES OF AMERICA. }

OTTO WANGERIN, PLAINTIFF IN ERROR, } No. 665.  
v.  
THE UNITED STATES OF AMERICA. }

WALTER WANGERIN, PLAINTIFF IN  
ERROR, } No. 666.  
v.  
THE UNITED STATES OF AMERICA. }

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MINNESOTA.*

LOUIS KRAMER AND MORRIS BECKER, PLAINTIFFS IN ERROR, <i>v.</i> THE UNITED STATES.	No. 680.
LOUIS KRAMER, PLAINTIFF IN ERROR, <i>v.</i> THE UNITED STATES.	
EMMA GOLDMAN AND ALEXANDER BERKMAN, PLAINTIFFS IN ERROR, <i>v.</i> THE UNITED STATES.	No. 702.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

ALBERT JONES, APPELLANT, <i>v.</i> H. W. PERKINS, DEPUTY UNITED STATES MARSHAL, AND M. G. WHIT- TLE, JAILOR OF RICHMOND COUNTY, GEORGIA.	No. 738.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.*

**BRIEF FOR THE UNITED STATES.**

**STATEMENT.**

These cases are alike in that all of them are brought to this court by direct writ of error or appeal under section 238 of the Judicial Code. All of them assert as a basis for jurisdiction the unconstitutionality of the Selective Draft Law of May 18, 1917 (Public No. 12, 65th Cong.).

They are further alike in that the only section of that law with which any of the plaintiffs in error have so far come into collision is section 5, which provides—

That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the dis-

trict court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Thus plaintiffs in error Joseph F. Arver (No. 663), Alfred F. Grahl (No. 664), Otto Wangerin (No. 665), Walter Wangerin (No. 666), and Louis Kramer (No. 681) were indicted and convicted of having wilfully failed and refused to present themselves for registration or to submit thereto as in said section provided.

Appellant Albert Jones (No. 738) was taken before a United States Commissioner for the Southern District of Georgia upon a warrant charging the same offense, and, in default of bail, was committed to answer an indictment. He thereupon sued out

a writ of habeas corpus from the District Court of the United States for that district, which court, upon hearing, dismissed the petition. 243 Fed. 997. From this order he appeals.

Plaintiffs in error Charles E. Ruthenberg, Alfred Wagenknecht, and Charles Baker (No. 656) were indicted in the District Court of the United States for the Northern District of Ohio under section 5 aforesaid and section 332 of the Criminal Code upon the charge that they did unlawfully aid, abet, counsel, command, induce, and procure one Alphons J. Schue in unlawfully and wilfully failing and refusing to present himself for registration and to submit thereto; while plaintiffs in error Louis Kramer and Morris Becker (No. 680) and plaintiffs in error Emma Goldman and Alexander Berkman (No. 702) were indicted in the District Court of the United States for the Southern District of New York under section 5 aforesaid and sections 37 and 332 of the Criminal Code, and were convicted of the offense of conspiring to aid, abet, counsel, command, induce, and procure divers persons to wilfully fail and refuse to present themselves for registration and to submit thereto.

All of the cases challenge upon various grounds the constitutionality of the Selective Draft Act as a whole and of various provisions thereof. In some of the constitutional objections urged it is clear that none of these plaintiffs in error has any personal interest, since their rights have not yet been infringed.

All of the objections are believed to be so entirely without foundation, either in reason or precedent, that a motion to dismiss the writs of error and the appeal as frivolous would properly lie.

In *Ruthenberg and others v. The United States*, No. 656, *Louis Kramer and Morris Becker v. The United States*, No. 680, and *Berkman and Goldman v. The United States*, No. 702, errors are assigned aside from the constitutional question. In the latter two cases the sole additional question is whether the facts warranted the convictions. In the *Ruthenberg* case it is contended that various trial proceedings violated the Constitution. In all three cases, we submit that if the constitutional questions under the act are so lacking in merit as to warrant dismissal of the writs of error the other assignments must fall also.

The Government's brief, therefore, is divided into two parts: Part one, *the constitutionality of the act*, in which an effort is made to answer *seriatim* all the various grounds to the contrary which are urged by any of the plaintiffs in error; and, part two, *other errors assigned*.

## PART ONE.

### THE CONSTITUTIONALITY OF THE ACT.

#### BRIEF OF ARGUMENT.

I. Congress has power to raise armies for both domestic and foreign service by selective draft. Constitution, Article I, section 8.

1. The power "to declare war" includes the power to compel military service.

2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."

(a) That the power to compel military service is an incident of sovereignty appears from the custom of nations.

(b) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.

(c) The history of this clause in the Convention shows a definite intent not to limit the Nation to voluntary enlistments.

(d) The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.

(e) Our national history demonstrates the existence of the power by its exercise.

(f) The decisions of the courts uniformly recognize the power of the Government to compel military service.

(g) There is not, as asserted, any common-law right of a soldier not to be sent out of the country.

## II. The Selective Draft Law infringes no provision of the Constitution concerning the militia.

1. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.

(a) The power granted to Congress over the militia of the States (Constitution, Art. I, sec. 8, clauses 15, 16) is not in limitation but in extension of the power to raise an army (clause 12).

(b) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.

2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the draft law is not that of militiamen but of citizens.

(a) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.

(b) Members of the National Guard also are called out, not as militiamen but as citizens of the United States.

3. Assuming *arguendo* that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.

## III. The Selective Draft Law imposes neither slavery nor involuntary servitude.

IV. The act is not unconstitutional on the ground that State officials aid in its enforcement.

V. The act does not delegate legislative authority to administrative officials.

VI. The act does not infringe the provisions of the Constitution concerning the judicial power. Article I, section 8, clause 9; Article III, sections 1 and 2.

VII. The due process clause is not violated.

VIII. The Selective Draft Law neither establishes a religion nor prohibits its free exercise.

IX. Other constitutional questions under the act.

#### ARGUMENT.

##### I.

**CONGRESS HAS POWER TO RAISE ARMIES FOR BOTH DOMESTIC AND FOREIGN SERVICE BY SELECTIVE DRAFT. CONSTITUTION, ARTICLE I, SECTION 8.**

The highest duty of every citizen is to serve his country in time of need. The duty of the arms-bearing population to respond to the call of the Nation is inherent in the nature of citizenship. The obligation has been explained as in the nature of an implied contract. In the early constitutions of five States it was agreed that the individual consents to render military service in return for protection to life, liberty, and property (*infra*, p. 18). Vattel, whose "Law of Nations" appeared in 1758, on the other hand, emphasized the rights of the sovereign, rather than the duties of the subject. After stating that "no person is naturally exempt from taking up

arms in defense of the State, the obligation of every member of society being the same," he submitted that "society can not otherwise be maintained." Book 3, c. 2, secs 8 and 10. This obligation of the citizen to his nation is fundamental and universally recognized.

It would be strange indeed if, alone among the nations, the Government of the United States, ordained and established to "provide for the common defence" and to "secure the blessings of liberty to ourselves and our posterity," were prohibited by its organic law from using those means approved by the common experience of mankind as essential to such protection and security. It would be a contradiction in terms to declare the Government of the United States a sovereign, endowed with all the powers necessary for its existence, yet lacking in the most essential of all—the power of self-defense. And it would be a melancholy reflection upon the Constitution making of 1787, coming as it did after the disastrous effects of the Confederation's lack of power to command directly the military service of the citizens of the States had been deeply felt, if the Government which then arose were no better equipped than its predecessor.

As might be anticipated, therefore, the Constitution is explicit in its grants of plenary power. Article I, section 8, provides:

The Congress shall have power—

(Cl.) 1. To lay and collect taxes, duties, imposts and excises, to pay the debts and

provide for the common defence and general welfare of the United States; \* \* \*

(Cl.) 11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

(Cl.) 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

(Cl.) 13. To provide and maintain a navy;

(Cl.) 14. To make rules for the government and regulation of the land and naval forces;

(Cl.) 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any department or officer thereof.

The purpose of these wide grants of power was expressed in the preamble:

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

**1. The power to declare war includes the power to compel military service.**

The power granted to declare war involves the power to carry it on successfully. The means necessary to that end are granted. Article I, section 8,

clause 18, makes this clear. To quote again from Vattel:

As war cannot be carried on without soldiers, it is evident that whoever has the right of making war, has also naturally that of raising troops. (Book 3, c. 2, sec. 7.)

In *United States v. Sugar*, 243 Fed. 423, 436, the court, in quoting from *Kneedler v. Lane*, 45 Pa. St. 238, said:

\* \* \* "The power to declare war necessarily involves the power to carry it on, and this implies the means, saying nothing now of the express power 'to raise and support armies,' as the provided means. \* \* \* But the power to carry on war, and to call the requisite force into service, inherently carries with it the power to coerce or draft. A nation without the power to draw forces into the field, in fact would not possess the power to carry on war. The power of war, without the essential means, is really no power; it is a solecism."

**2. Congress may compel citizens to serve in the land forces under the power "to raise and support armies."**

As to method, the power conferred upon Congress to raise armies is as broad as language can make it. The only restriction refers to appropriations in support of the armies raised. There is no proviso such as plaintiffs in error seek to insert:

*Provided*, That no person shall be compelled to do military duty otherwise than by voluntary enlistment.

Nor is there any limitation in any other section of the Constitution.

We deal here, not with powers implied but with express grants. Congress is expressly empowered to use all means necessary and proper to the exercise of the power to raise armies. Any method may be employed within the discretion of Congress which does not in itself violate rights guaranteed by other clauses of the Constitution. Voluntary enlistment if deemed appropriate, may be tried. If under the circumstances Congress provides for a selective draft as the means considered necessary, the Constitution contains no prohibition. Authorization to employ either method is expressed.

In the classical language of the Chief Justice in *McCulloch v. Maryland*, 4 Wheat. 316:

(p. 407) \* \* \* In considering this question, then, we must never forget that it is a *constitution* we are expounding.

(p. 409) The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

(p. 415) \* \* \* The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence

could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

Only sheer hardihood would seriously deny that among the appropriate means to which Congress may resort in raising armies is the selective draft. Indeed, it requires no extended argument to show that it is not only an appropriate means but under the conditions of modern warfare the most prudent, just, and equitable method which can be employed. Under present conditions war is not a matter of men, but of nations. All of the resources of the

combatants, human and material, are thrown into the scale. As it is in the power of the Government to compel, so it is the duty of all its citizens to give, regardless of personal preference, the service which they can most efficiently render. Those who bear the responsibility of leadership must have also the power to assign every citizen to the station he is best qualified to fill. The armies in the field must be equipped and maintained by the producers and artisans at home, and men must serve the one or the other purpose as the necessities of the occasion require. Nor is it any longer just to leave the performance of military duties only to the most ardent and patriotic, instead of distributing them with equity over the population as a whole. It can not be necessary to vindicate the legislative discretion by enlarging upon this theme.

**(a) That the power to compel military service is an incident of sovereignty appears from the custom of nations.**

The Constitution establishes the United States of America as a sovereign nation. In its field, to carry out powers expressly granted, it has all the rights of any similar sovereignty. These include, for instance, the power to take dependencies. *De Lima v. Bidwell*, 182 U. S. 1; *Mormon Church v. United States*, 136 U. S. 1, 42. Incident to its control over international relations, as every other nation, it may exclude aliens. *Fong Yue Ting v. United States*, 149 U. S. 698, 705-708, 711. Like other sovereigns, it may exercise the power of eminent domain. *United States v. Jones*, 109 U. S. 513,

518. We may test its right to employ the power of conscription by the same comparison.

That compulsory military service is enforced by practically all the nations of the globe at the present time is a matter of common knowledge. Of this the court may take judicial notice. References properly and readily available to the court are as follows: The Americana, vol. 5, title "Conscription"; Ency. Brit., 11th ed., vol. 6, title "Conscription"; Pamphlet issued by Army War College, November, 1915, entitled "Statistical Comparison of Universal and Voluntary Military Service."<sup>1</sup>

See the conscription act of Great Britain, entitled "Military Service Act," January 27, 1916, 5 and 6 George V, c. 104, p. 367; amended by the Military Service Act of 1916, May 25, session 2, 6, and 7, George V, c. 15, p. 33; the recent Canadian conscription act, entitled "Military Service Act" of August 27, 1917, expressly providing for service abroad (printed in the Congressional Record of September

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<sup>1</sup> The Statesman's Yearbook for 1917 cites the following governments as enforcing military service: Argentine Republic, p. 656; Austria-Hungary, p. 667; Belgium, p. 712; Brazil, p. 738; Bulgaria, p. 747; Bolivia, p. 728; Colombia, p. 790; Chile, p. 754; China, p. 770; Denmark, p. 811; Ecuador, p. 820; France, p. 841; Greece, p. 1001; Germany, p. 914; Guatemala, p. 1009; Honduras, p. 1018; Italy, p. 1036; Japan, p. 1064; Mexico, p. 1090; Montenegro, p. 1098; Netherlands, p. 1119; Nicaragua, p. 1142; Norway, p. 1152; Peru, p. 1191; Portugal, p. 1201; Roumania, p. 1220; Russia, p. 1240; Serbia, p. 1281; Siam, p. 1288; Spain, p. 1300; Switzerland, p. 1337; Salvador, p. 1270; Turkey, p. 1353.

20, 1917, 55th Cong. Rec., p. 7959); the Conscription Law of the Orange Free State, Law No. 10, 1899; Military Service and Commando Law, sections 10 and 28; Laws of Orange River Colony, 1901, p. 855; of the South African Republic "De Locale Wetten en Volksraadsbesluiten der Zuid-Afr. Republiek," 1898, Law No. 20, pp. 230, 233, article 6, 28; Constitution, German Empire, April 16, 1871, Art. 57, 59; Dodd, 1 Modern Constitutions, p. 344; Gesetz, betreffend Änderungen der Wehrpflicht, vom 11 Feb. 1888, No. 1767, Reichs-Gesetzblatt, p. 11, amended by law of July 22, 1913, No. 4264, RGBl., p. 593; Loi sur de recrutement de l'armee of 15 July, 1889 (Duvergier, vol. 89, p. 440), modified by act of 21 March, 1905 (Duvergier, vol. 105, p. 133).

The treaties of the United States afford further evidence of the prevalence of compulsory military service in other countries, for provisions are common in them which exempt consuls and citizens of the United States from military service in the forces of the treaty nation.<sup>1</sup> In several naturalization treaties

<sup>1</sup> See Malley, Treaties, Conventions, etc. (1910), vols. 1, 2; edition by Charles (1913), vol. 3; Argentine Republic, 1853, Art. X, p. 23; Austria-Hungary, 1870, Art. II, 40; Belgium, 1880, Art. III, 95; Congo, 1891, Art. III, 329; Costa Rica, 1851, Art. IX, 344; Greece, 1902, Art. III, 856; Hayti, 1864, Art. V, 922; Honduras, 1864, Art. IX, 955; Italy, 1871, Art. III, 970; Japan, 1894, Art. I, 1029; Japan, 1911, Art. I, Charles, vol. 3, p. 78; Mexico, 1831, Art. IX, 1088; Paraguay, 1859, Art. XI, 1367; Roumania, 1881, Art. III, 1506; Servia, 1881, Art. IV, 1615; Spain, 1902, Art. V, 1703; Sweden, 1910, Art. III, Charles, vol. 3, 113; Switzerland, 1850, Art. II, 1764; Salvador, 1870, Art. 29, 1560; Tonga, 1886, Art. IX, 1783; Venezuela, 1860, Art. II, 1846.

also it is provided that citizens of the treaty nation in certain cases may be compelled to render military service on return to their original land.<sup>1</sup>

**(b) The compulsory draft was a normal method of raising armies in the United States at the time the Constitution was adopted.**

The most reluctant must concede that the grant of power to raise armies includes the use of such means as were known and customarily exercised in this country in 1787. It is important therefore to note that the compulsory draft was expressly recognized in many constitutions of the several States, was enforced by the States for local purposes in calling out the militia, and also for obtaining levies to fill up the ranks of the Continental Army.

The constitutions of five States during the Revolutionary War period express the principle of universal military service. Article 8 of the constitution of Pennsylvania of 1776 provides:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto. (Thorpe, American Charters, Con-

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<sup>1</sup> Austria-Hungary, 1870, Art. II (Melloy, vol. 1, p. 46); Baden, 1868, Art. II (*id.* 54); Belgium, 1868, Art. III (*id.* 80); Sweden and Norway, 1869, Art. II (*id.* 1760); Wurttemberg, 1868, Art. II (*id.* 1897).

stitutions and Organic Laws, vol. 5, pp. 3081, 3083.)<sup>1</sup>

New Hampshire, in the constitution of 1784, part 1, article 13, provided:

No person who is conscientiously scrupulous about the lawfulness of bearing arms shall be compelled thereto provided he will pay an equivalent.<sup>2</sup> (Thorpe, vol. 4, p. 2455.)

Militia duty was imposed upon all arms-bearing citizens of the original thirteen States during the 18th century. This duty was not regarded as voluntary. Militia commanders were given discretionary power by the State statutes to detach or to draft militiamen either by classes or as individuals. Exemptions were

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<sup>1</sup> See language almost precisely similar in the Constitution of Vermont, 1777, c. 1, Art. 9 (Thorpe, vol. 6, pp. 4747, 3740); Vermont, 1786, c. 1, Art. 10 (*id.*, vol. 6, 3753); Vermont, 1793, c. 1, Art. 9 (*id.*, vol. 6, 3762, 3763); New York, 1777, Art. 40 (*id.*, vol. 5, 2637); Massachusetts, Bill of Rights, 1780, Art. 10 (*id.*, vol. 3, 1891); New Hampshire, 1784, pt. 1, Bill of Rights, Art. 12 (*id.*, vol. 4, 2455); Constitution of New Hampshire, Bill of Rights, Art. 12 (*id.*, vol. 4, 2471).

<sup>2</sup> Similar provisions were in the constitutions of New York, 1777, art. 40 (Thorpe, vol. 5, 2637); Pennsylvania, 1776, art. 8 (*id.*, vol. 5, 3083); Vermont, 1777, c. 1, art. 9 (*id.*, vol. 6, 3740-41); Vermont, 1786, c. 1, art. 10 (*id.*, vol. 6, 3753).

Other provisions in the early constitutions for compulsory military service are as follows: Massachusetts, 1780, pt. II, c. 2, art. 7 (Thorpe, vol. 3, 1901; New Hampshire, 1784, pt. 2, Executive Power (*id.*, vol. 4, pp. 2463-2464); Delaware, 1776, art. 9 (*id.*, vol. 1, 562, 564); Maryland, 1776, art. 33 (*id.*, vol. 3, 1686, 1696); Virginia, 1776, Militia (*id.*, vol. 7, p. 3817); Georgia, 1777, art. 33, art. 35 (*id.*, vol. 2, 777, 782).

granted usually for State officials and workmen engaged in peculiarly vital industrial pursuits and to Quakers, Mennonites, and other conscientious objectors. The statutes are given in Appendix "A," *infra*, p. 123.

The draft was several times appealingly recommended by the Continental Congress to the States as a means of recruiting the Continental Army. The Continental Congress, under the Articles of Confederation, articles 7 and 9, made requisitions on the States for quotas of men for the Continental battalions. Since the requisitions were not binding, the acts of the Congress took the form of suggestions to the States. The suggestions were earnestly made. The Journals of the Continental Congress afford ample demonstration that the draft was a normal method of raising armies at the time.<sup>1</sup>

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<sup>1</sup> On April 14, 1777, it is recorded:

"Resolved, That if the several quotas of the States can not be furnished by any of the means recommended in the foregoing resolutions [bounties and exemptions to militiamen who furnish recruits], or by any other means by the said legislatures devised before the 15th day of May next, it is recommended to each State to cause indiscriminate drafts to be made from their respective militia.

"That it be recommended to the said legislatures to apply all of the means by these resolutions recommended in the manner which they shall judge most effectual for speedily completing the army, and in case they shall prove unsuccessful, that they cause drafts aforesaid to be made." Vol. 7, Ford's edition, Library of Congress, pp. 262-263; vol. 2, edition by Way & Gideon, p. 91.

February 26, 1778: "Resolved, That the several States hereafter named be required forthwith to fill up by drafts

Complying with the recommendations of the Continental Congress the States enacted statute after statute providing for drafting or detaching citizens from their militia, or in any other way that shall be effectual, their respective battalions of Continental troops, according to the following arrangement: \* \* \*

"That all persons drafted shall serve in the Continental battalions of their respective States for the space of nine months \* \* \*." Journals of Congress, vol. 4, pp. 85 to 87; Folwell's Press, 1800. See Journals of Congress, edition of Way & Gideon, 1823, vol. 2, pp. 458, 459; Ford's edition, Library of Congress, vol. 10, pp. 199, 200.

March 9, 1779: "*Resolved*, That the above-recited clause of the said act of Congress [providing for bounties for voluntary enlistment] be repealed, and that it be earnestly recommended to the several States to make up and complete their respective battalions to their full complement by drafts, or in any other manner they shall think proper, and that they shall have their quotas of deficiencies ready to take the field, and to march to such place as the Commander-in-chief shall direct without delay." Folwell's edition, vol. 5, p. 70; Way & Gideon's edition, vol. 3, p. 223; Ford's edition, Library of Congress, vol. 13, p. 299.

Washington renewed his recommendation to Congress on November 18, 1779, for a draft as the means of maintaining the army. Sparks Writings, vol. 6, pp. 401, 404. Committee reports on the matter were made in Congress December 7, 1779. Ford's edition, vol. 15, p. 1358; Dec. 14, 1779, *id.*, vol. 15, p. 1376. An annual draft act passed in accordance with the recommendation of the Commander-in-chief on December 18, 1779. *id.*, vol. 15, p. 1393; edition by Way & Gideon, vol. 3, p. 413. A further draft act was passed February 9, 1780, Ford's edition, vol. 16, p. 150; Way & Gideon's edition, vol. 3, p. 432; Folwell's edition, vol. 6, p. 18.

A report that a spirit of enlisting among drafted men was taking place is made in vol. 3, Way & Gideon's edition, p. 38; Folwell's edition, vol. 4, p. 361.

to fill up the Continental battalions. Appendix "B," *infra*, p. 131. These statutes, it is submitted, conclude the present cases in so far as they depend upon the meaning which the framers of the Constitution attached to the power to raise armies.

(c) The history of this clause in the Convention shows a definite intent not to limit the nation to voluntary enlistments.

In the Constitutional Convention of 1787 restrictions upon the grant of power to raise armies were proposed as amendments and voted down. The first drafts of the Constitution reported by the Committee on Detail empowered Congress "to make war, to raise armies, to build and equip fleets." Supp. to Elliot's Debates, vol. 5, pp. 378, 379, proceedings of August 6, 1787. On August 18 Messrs. Martin and Gerry moved to amend the clause as follows: "*Provided*, That in time of peace the Army shall not consist of more than — thousand men." The following proceedings are then reported:

Gen. Pinckney asked whether no troops were ever to be raised until an attack should be made on us.

Mr. Gerry. If there be no restriction, a few States may establish a military government.

Mr. Williamson reminded him of Mr. Mason's motion for limiting the appropriation of revenue as the best guard in this case.

Mr. Langdon saw no room for Mr. Gerry's distrust of the representatives of the people.

Mr. Dayton. Preparations for war are generally made in peace, and a standing force of

some sort may, for aught we know, become unavoidable. He should object to no restrictions consistent with these ideas.

The motion of Mr. Martin and Mr. Gerry was disagreed to *nem. con.*

(Farrand's Records of the Federal Convention, vol. 2, p. 323, 330; Supp. to Elliot's Debates, vol. 5, p. 443.)

On September 5, 1787, the limitation which now appears "But no appropriation of money to that use shall be for a longer term than two years," was added. Supp. to Elliot's Debates, vol. 5, pp. 510, 511; Farrand, vol. 2, pp. 505, 509, 570, 595. Mr. Gerry refused to sign the Constitution on September 15, giving as one of his grounds of objection that Congress would have the power to raise armies and money without limit. Elliot, vol. 5, p. 553.

The power to compel military service was even more precisely considered. Virginia and North Carolina and Rhode Island in ratifying the Constitution each submitted amendments to limit the power of Congress to raise armies by draft. Virginia proposed to limit the power over the religious objector. On June 26, 1788, she submitted an amendment for the consideration of the first Congress which should assemble under the Constitution, as follows:

[19th section of the Bill of Rights.] That any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead. (Journals of Congress, vol. 13,

Appendix, p. 176, Folwell's Press, 1801; 3 Elliot's Debates, p. 659.)

An amendment in the same terms was submitted by North Carolina in ratifying the Constitution, August 1, 1788. Appendix, Journals of Congress, published by Folwell, 1801, vol. 13, p. 184 *et seq.*; 4 Elliot's Debates, pp. 242, 244, 251, 252.

Rhode Island was more ambitious. On May 29, 1790, the Rhode Island convention proposed an amendment in terms substantially similar to those proposed by plaintiffs in error:

That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, or any law made under the Constitution, to the contrary notwithstanding. (1 Elliot's Debates, p. 336.)

The rejection of the many limitations proposed shows not only that the language employed in the Constitution was definitely intended by the Constitution makers to include the power to draft but also that this was the contemporary interpretation.

(d) **The history of the times shows that a prime object of the Constitution was to cure the impotence of the Continental Congress directly to require military service from the citizens of the States.**

Under the Articles of Confederation the Continental Congress was authorized "to agree upon the number of land forces and to make requisitions upon each State for its quota." The States were to appoint the regimental officers, raise the men, and clothe, arm,

and equip them in a soldier-like manner. Articles 7, 9. 1 Stat. 6, 7. No power over the individual citizens of the State was granted. The Congress had no means of enforcing its requisitions upon the States. 1 Stat. 6, 7. As a result the States responded to the calls of Congress as their own particular necessities dictated. The defect was the occasion of many expressions of anguish by the Commander-in-Chief. Sparks, *Writings of Washington*, vol. 7, pp. 442, 444. On August 20, 1780, in a letter to the President of Congress, Washington wrote with reference to a plan for providing soldiers:

The plan for this purpose ought to be of general operation, and such as will execute itself. Experience has shown, that a peremptory draft will be the only effectual one. If a draft for the war or for three years can be effected, it ought to be made on every account. (7 Sparks, *Writings of Washington*, p. 162.)

It is a thing, that has been all along ardently desired by the army, that every matter which relates to it should be under the immediate direction of Congress. The contrary has been productive of innumerable inconveniences. (7 Sparks, *supra*, 167.)

See also Upton, *Military Policy of the United States*, pp. 10, 13, 23, 42, 54. The situation during the revolutionary period is described in the *Federalist* No. 22, p. 143, as follows:

The power of raising armies, by the most obvious construction of the articles of the Confederation, is merely a power of making

requisitions upon the States for quotas of men. This practice in the course of the late war, was found replete with obstructions to a vigorous and to an economical system of defense. It gave birth to a competition between the States which created a kind of auction for men. In order to furnish the quotas required of them, they outbid each other till bounties grew to an enormous and insupportable size. The hope of a still further increase afforded an inducement to those who were disposed to serve to procrastinate their enlistment, and disinclined them from engaging for any considerable periods. Hence, slow and scanty levies of men, in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; continual fluctuations in the troops, ruinous to their discipline and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence, also, those oppressive expedients for raising men which were upon several occasions practiced, and which nothing but the enthusiasm of liberty would have induced the people to endure.

All these things were fresh in the minds of everyone. The first concern was to prevent their repetition.

Madison, in the forty-first number of the *Federalist*, wrote as follows (p. 276):

With what color of propriety could the force necessary for defense be limited by those who can not limit the force of offense? If a federal constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the dis-

eration of its own government and set bounds to the exertions for its own safety.

Hamilton also treated of the matter in the Federalist, especially in Nos. 22-25. In the twenty-third number he wrote (p. 152):

The authorities essential to the care of the common defense are these; to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. *These powers ought to exist without limitation*, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. \* \* \*

(p. 153) And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and reasonably disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the national forces.

Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of

it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations. As their requisitions are made constitutionally binding upon the States, who are in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to the "common defense and general welfare." It was presumed that a sense of their true interests, and a regard to the dictates of good faith, would be found sufficient pledges for the punctual performance of the duty of the members to the federal head.

The experiment has, however, demonstrated that this expectation was ill-founded and illusory; and the observations, made under the last head, will, I imagine, have sufficed to convince the impartial and discerning, that there is an absolute necessity for an entire change in the first principles of the system; that if we are in earnest about giving the Union energy and duration, we must abandon the vain project of legislating upon the States in their collective capacities; we must extend the laws of the federal government to the individual citizens of America; we must discard the fallacious scheme of quotas and requisitions, as equally impracticable and unjust. The result from all this is that the Union ought to be invested with full power to levy troops; to build and equip fleets; and to raise the revenues

which will be required for the formation and support of an army and navy, in the customary and ordinary modes practiced in other governments.

(e) **Our national history demonstrates the existence of the power by its exercise.**

The history of the Nation is appealed to by the plaintiffs in error as showing the lack of power to compel military service. Briefs, Nos. 663 to 666, pp. 10, 12, 36. The appeal is vain, for while, fortunately, occasions for the draft have been infrequent, it has been resorted to without flinching when the emergency arose.

It was largely by means of forced drafts that the War of Independence was successfully concluded. See Appendices "A" and "B," pp. 123, 131. Near the conclusion of the War of 1812 it seemed that a general draft to recruit the national forces would again be necessary. James Monroe, then Secretary of War, submitted a draft bill to Congress with an argument in its favor so unanswerable that it might well be adopted as the Government's argument on the present hearing. It is printed herewith as Appendix "D," p. 135.

During the Civil War the draft was resorted to upon both sides. President Lincoln declared his view of the matter in no uncertain terms. Said he:

The principle of draft, which simply is involuntary or enforced service, is not new. It has been practiced in all the ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies,

at the time they placed in that instrument the provision that "the Congress shall have power to raise and support armies." It had been used just before in establishing our independence, and it was also used under the Constitution in 1812. Wherein is the peculiar hardship now? Shall we shrink from the necessary means to maintain our free Government, which our grandfathers employed to establish it, and our own fathers have already employed once to maintain it? Are we degenerate? Has the manhood of our race run out? \* \* \*

With these views and on these principles I feel bound to tell you it is my purpose to see the draft law faithfully executed. (Excerpt from President Lincoln's unpublished address, Senate Report No. 22, 65th Cong., 1st sess., 55 Cong. Rec. 923, 924, 925.)

Revised Statutes, section 1998, carried forward from 1865 and amended by act of August 22, 1912, c. 336, 37 Stat. 356, provides for loss of citizenship by anyone "who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service."

Statutes providing for compulsory militia service have been in force from the beginning. See statutes in 17th and 18th centuries, Appendix "A," *infra*, p. 123. Similar present-day militia statutes of various States and Territories are collected in Appendix "C," *infra*, p. 133.

The more important Congressional acts providing for drafting the militia are: Act of Feb. 28, 1795, c. 36, 1 Stat. 424, amended by act of April 18, 1814, c. 82, 3 Stat. 134 (see *Houston v. Moore*, 5 Wheat. 1, and *Martin v. Mott*, 12 Wheat. 19); and act of July 17, 1862, c. 201, 12 Stat. 597.

(f) **The decisions of the courts uniformly recognize the power of the Government to compel military service.**

Some *dicta* there are which, by reason of the facility with which they adduce illustrations as facts universally acknowledged, acquire the force of adjudicated cases. Of such character are the repeated passages in the opinions of this court recognizing the power of the Government to draft.

In *Tarble's* case, 13 Wall. 397, 408, holding that the State court has no jurisdiction to release an enlisted man in the hands of Federal officers, Mr. Justice Field said (p. 408):

Among the powers assigned to the National government is the power "to raise and support armies" and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, *whether by voluntary enlistment or forced draft*, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be

assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.

In *Grimley's* case, 137 U. S. 147, 153, involving the validity of an enlistment of a soldier over age, Mr. Justice Brewer said:

The Government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all.

See also *Presser v. Illinois*, 116 U. S. 252, 265; *Robertson v. Baldwin*, 165 U. S. 275, 282, *infra*, p. 65; *Jacobson v. Massachusetts*, 197 U. S. 11, 29, *infra*, p. 81; *Butler v. Perry*, 240 U. S. 328, 332, 333, *infra*, p. 64.

The Conscription Act of 1863 was held a valid exercise of the power to raise armies. *Kneedler v. Lane*, 45 Pa. St. 238; act of March 3, 1863, c. 75, 12 Stat. 731, amended by act of February 24, 1864, c. 13, 13 Stat. 6; act of July 4, 1864, c. 237, 13 Stat. 379; act of March 3, 1865, c. 79, 13 Stat. 487. In *United States v. Scott*, 3 Wall. 642, and *United States v. Murphy*, 3 Wall. 649, this court, in answering questions certified, construed the act of 1863, and the

amendatory act of 1864, no question of constitutionality being raised.

The validity of the draft acts of the Confederate States during the Civil War was vigorously attacked in the Confederate courts. The pertinent clauses of the constitution of the Confederate States were in precisely the same terms as the similar clauses in the Constitution of the United States. The statutes were sustained as a means of carrying into effect the power "to raise and support armies." *Burroughs v. Peyton*, 16 Gratt. 470; *Ex parte Coupland*, 26 Tex. 386; *Jeffers v. Fair*, 33 Ga. 347; *Barber v. Irwin*, 34 Ga. 27; *Gatlin v. Walton*, 60 N. C. 333, 408; *Ex parte Hill*, 38 Ala. 429; *Ex parte Stringer*, 38 Ala. 457; *Parker v. Kaughman*, 34 Ga. 136; *Daly & Fitzgerald v. Harris*, 33 Ga. Supp. 38, 54; *Simmons v. Miller*, 40 Miss. 19; *Ex parte Bolling*, 39 Ala. 609; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459.

Compulsory militia service has also been enforced by the courts. In *Houston v. Moore*, 5 Wheat. 1, and *Martin v. Mott*, 12 Wheat. 19, court-martial sentences were sustained against militiamen who failed to respond to the Federal call during the War of 1812. The act of Congress of July 17, 1862, c. 201, 12 Stat. 597, requiring performance of militia duty, was sustained in *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225; *In re Griner*, 16 Wis. 423; *Druecker v. Solomon*, 21 Wis. 621; *In re Spangler*, 11 Mich. 298; *Allen v. Colby*, 47 N. H. 544. As to the power of the State to draft see also *Lanahan v. Birge*, 30 Conn. 438, 443; *People ex rel. German Ins.*

*Co. v. Williams*, 145 Ill. 573, 583; *In re Dassler*, 35 Kans. 678, 684; *State v. Wheeler*, 141 N. Car. 773, 777.

The present Selective Draft Act has been sustained in every case which has come before the courts. Cases in the Federal courts in addition to those now on hearing are *United States v. Sugar* (D. C.), 243 Fed. 423; *Angelus v. Sullivan* (C. C. A. 2d C.; not reported); *United States v. Stephens* (D. C. Del.; not reported); *Ex parte Hackenberg* (D. C. Nor. Ohio; not reported); *United States v. Yanyar* (D. C. R. I.; not reported); *United States v. Cattell & Phillips* (D. C. S. D. N. Y.; not reported). See also *Claudius v. Davie*, 174 Cal. —, 165 Pac. 689.

(g) **There is not, as asserted, any common-law right of a soldier not to be sent out of the country.**

The fifth assignment of error in the *Jones* case, No. 738, complains of error "in holding that appellant, contrary to his common-law rights as a citizen of the United States, was and is liable to compulsory military service beyond the seas and without the realm of the United States" (brief, p. 6).

Counsel in the *Minnesota* cases, Nos. 663-666, discuss the military obligations of Englishmen (brief, p. 8 *et seq.*). So far as the asserted rights of State militiamen are concerned, discussion is postponed (*infra*, p. 46 *et seq.*).

The status of a citizen properly drafted into the land forces of the United States is that of a soldier no less than the status of one who has voluntarily enlisted. Both must obey the commands of their

superiors. The willingness with which one has become a soldier affords no ground for distinction. Every citizen impliedly consents to become a soldier in case of need. The soldier who, having become such involuntarily, disobeys an order to go to the place where the enemy is to be met is no less a deserter than a volunteer who does the same.

Again, the testimony of history is conclusive. Our armies have served in all parts of the world. The flag has waved over the national forces at Tripoli (Treaty of Peace with Tripoli, 1805, Art. III, 2 Malloy's Treaties, p. 1789); and at Tampico (*Fleming v. Page*, 9 How. 603); in Mexico, in China, and in Canada. Our legions have been victorious on the soil of Cuba, Porto Rico and the Philippines, in the Caribbean and across the Pacific.

Such foreign service has never been regarded as illegal. Indeed this court has spoken to the contrary in *Fleming v. Page*, 9 How. 603, involving a question as to duties on goods imported from Tampico, Mexico, while that city was occupied by our troops. Mr. Chief Justice Taney said (p. 615):

As commander-in-chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. \* \* \* The power of the President under which Tampico and the State of

Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government.

In the Treaty of Alliance of 1778 with France, in force when the Constitution was adopted, the aid of the United States to France was pledged if war should break out between France and Great Britain (Art. I); conquest of Canada and the Islands of Bermudas by the United States was contemplated (Art. V). 1 Malloy's Treaties, pp. 479-481.

Prior to the adoption of the Constitution in 1787 the militia statutes passed by the Original States frequently provided that the militia forces might be sent into neighboring States. See the following: Maryland, acts of 1778, October, c. 10; Connecticut, Laws 1784, p. 147; Rhode Island, act of December, 1777, pp. 10, 11; New York, April 3, 1778, c. 33; Laws 1777-1784, vol. 1, p. 68; act October 9, 1779, c. 13; Laws, *supra*, p. 159; act of April 4, 1782, 5th sess., c. 27; Laws, *supra*, p. 444, sec. 17; p. 446, sec. 20; Massachusetts Resolves, June, 12, c. 51, 1778, p. 18; Massachusetts Laws, May, 1776, c. 21, p. 89; Laws and Resolves, 1780-1, p. 680, c. 99; Resolve, June 28, 1781; New Hampshire, act March 18, 1780, c. 12, Metcalf's ed., vol. 4, p. 273; North Carolina, November, 1777, c. 19, vol. 24, State Records 128, 1778, 3d sess., c. 1, *id.*, p. 198, May, 1779, c. 1, vol. 24, State Records 254; New Jersey, act September 27, 1777, c. 44, sec. 5, Laws September, 1777, p. 99;

South Carolina, act February 13, 1779, No. 1116, 4 St. L. 465; act February 26, 1782, No. 1154, 9 St. L. p. 682; Pennsylvania, act March 20, 1780, c. 152, 10 St. L. 144, 156. If the contention of counsel be correct, such statutes of the still independent and nonunited States invaded the common-law rights which their citizens had enjoyed as colonists.

Counsel in the *Jones* case, No. 738, speak of "natural rights" (brief, p. 9). There is no natural right to disobey a valid legislative enactment. The notion, moreover, that compulsory military service is contrary to the spirit of democratic institutions (brief, No. 663, pp. 11, 12) is unfounded in fact. Our Constitution implies equitable distribution of the burdens no less than of the privileges of citizenship.

In a matter so fully covered by American precedent there is little need to invoke the history of England. But if it be material, it is easy to show that English history itself does not support, as counsel seem to think, the alleged right to be free from conscription for foreign service. The recent acts in England and Canada, *supra*, p. 16, indicate the parliamentary view that the voluntary recruiting system was followed for many years only as a matter of policy. See May's Constitutional History of England, vol. 2, pp. 136-138; vol. 3, pp. 280-283.

The military obligation of Englishmen in the days prior to the Revolutionary War is uncertain in extent. The militia existed prior to the Norman Conquest. Blackst. Comm., vol. 1, \*p. 409. Thereafter

the militia obligation was not forgotten (see Assize of Arms A. D. 1181; Stubbs, *Select Charters*, 8th ed., p. 153; Adams and Stephens, *Documents of Constitutional History*, p. 23; Stubbs, *Constitutional History*, Clarendon Press, 2d ed., vol. 1, p. 591; Statute of Winchester A. D. 1285, 13 Edward I, c. 6, 1 Stat. L. England, p. 234); also the feudal obligation of knights was enforced (Blackst. Comm., vol. 1, \*p. 410); as well as the subject's obligation of allegiance. The feudal obligation apparently was not merged in the obligation to bear arms. Pollock and Maitland "History of English Law," vol. 1, p. 234.

Various phases of the military obligation gave rise to struggle between the Crown and the representatives of the people. The contest of the Crown for the right to keep a standing army in time of peace without the consent of Parliament was settled by the Bill of Rights of 1688. 1 William and Mary, sess. 2, c. 2, sec. 1; 9 Stat. L. 67. Anciently there can be no doubt that the king exercised the prerogative of impressment—that is, an arbitrary selection of individual free men, to serve in the army. Barrington, *Observations on Ancient Statutes*, p. 334; Stubbs, *Constitutional History of England*, vol. 2, pp. 284, 540. Falstaff, apologizing for the cadaverous individuals whom he had gathered under his commission of array, said: "I have misused the king's press damnably." King Henry IV, part 1, act 4, scene 2.

The barons at one time disputed the right of the Crown to compel foreign service under the feudal obli-

gation; but as to the extent of the obligation of knight service, Pollock and Maitland say: "It is a question, we may say, which never receives any legal answer." 1 History of English Law, 232. When the knights did not furnish a sufficient force Stubbs states "recourse was had to the native population. Every free man was sworn under the injunction of the Conqueror to join in the defense of the king, his lands and his honour, within England and without." 1 Stubbs, Constitutional History of England, Clarendon Press, 2d ed., p. 33; under Henry III (2 Stubbs, *supra*, p. 280).

Commissions of array were developed under Edward I.

In 1282, on the 30th of July, he commissioned William le Butiller of Warrington to 'elect,' that is, to press or pick a thousand men in Lancashire. (Stubbs, vol. 2, p. 284.)

Edward II threw the expense of additional armies on the townships and counties.

Edward I moreover had always paid the wages of his forced levies; under Edward II the counties and even the townships were called upon to pay them; they were required to provide arms not prescribed by the statute of Winchester, to pay the wages of the men outside of their own area, and even outside of the kingdom itself. (Stubbs, vol. 2, p. 540.)

A petition was presented to Edward III "that the 'gentz de commune' might not be distrained to arm themselves at their own cost contrary to the statute of Winchester, or to serve beyond the limits of their

counties except at the king's cost." 2 Stubbs, p. 542. The statutes which resulted from the petitions are gathered in an appendix (Appendix "E").

But though the statutes come to prohibit the Crown from impressing soldiers without "the common consent and grant made in Parliament," and provide at a later day (1661) that subjects of the realm shall not be compelled to march out of the kingdom otherwise than by the laws of England ought to be done, 13 Car II, c. 6, 5 Stat. R. 308; 13 and 14 Car II, c. 3, 5 Stat. R. 358 (1662), nothing has been found which limits the *power* of *Parliament* to compel foreign military service. The obligation of every "lovinge and obedient subject" "accordinge to their bounden dutyes" to serve and assist his prince and sovereign "within this Realme and without this Realme" was expressly recognized in 1494 by act 11 Henry VII, c. 18, 4 Stat. L. England, p. 66; and in 1503, 19 Henry VII, 4 Stat. L. England, p. 82; 3 Henry VIII, c. 5, 4 Stat. L. England 111 (A. D. 1511, 1512); 2 and 3 Edward VI, c. 2, A. D. 1548, 4 Stat. Realm 39; see 4 and 5 Philip and Mary, c. 3, 4 Stat. R. 320 (1557). In 1592 Parliament levied a tax on the parishes for the Relief of Souldiers, 35 Eliz. c IV, 4 Stat. Realm, pt. 2, p. 847. The act provided "That everie Souldier or Marriner \* \* \* or such as shall hereafter return into this Realm hurte or maymed or grevouslie sickle, shall repaire \* \* \* to the Treasourers of the Countie out of which he was pressed, or if he be no prest man. \* \* \*" Parliament itself provided for impressment of vagrants to serve in the army in

1703, 2 and 3 Anne, c. 13, 8 Stat. R. 275; 4 Anne, c. 10, 8 Stat. R. 356 (1704); 4 and 5 Anne, c. 21, 8 Stat. R. 503 (1705); 7 Anne, c. 2, 9 Stat. R. 40 (1708); 29 George II, c. 4, 21 Stat. L. 318 (1756); 30 George II, c. 8, 22 Stat. L. 10 (1757); 18 George III, c. 53, 32 Stat. L. 117 (1778); 19 George III, c. 10, 32 Stat. L. 183 (1779). These latter statutes it is true applied only to a certain class of citizens. But if Parliament had power to draft one class, an increased military necessity would warrant the impressment of others. In 1640 Parliament enacted that the Justices of the Peace should "impresse \* \* \* persons as shall be fit and necessary," 16 Car 1, c. 28, 5 Stat. Realm 138, Appendix "E," *infra*, p. 138.

Blackstone mentions among the rights of Englishmen the right not to be banished, making it clear, however, that military service in foreign parts is not within the term (vol. 1, pp. \*137, 138). He said:

The law is in this respect so benignly and liberally construed for the benefit of the subject that though *within* the realm the King may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception. He cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might in reality be no more than an honorable exile.

The power to impress seamen to serve in the Navy was thoroughly established. See *King v. Douglass*, 5 East 477 (1804); *Ex parte Fox*, 5 Term Rep. 276; *Barrows Case*, 14 East 346; *King v. Young*, 9 East 466; *Reg. v. Broadfoot*, Foster's Crown Cases (1809), p. 154. Barrington's Observations on Ancient Statutes, p. 334. In *Rex v. Tubbs*, 2 Cowp. 517 (1776), Lord Mansfield said that this power was based upon immemorial custom. See Cooley on Constitutional Limitations, 6th ed., p. 363.

## II.

### **THE SELECTIVE DRAFT LAW INFRINGES NO PROVISION OF THE CONSTITUTION CONCERNING THE MILITIA.**

The militia is mentioned in five provisions of the Constitution, as follows:

Art. I, sec. 8. The Congress shall have power \* \* \*

(Cl.) 15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

(Cl.) 16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

Art. II, sec. 2. 1. The President shall be Commander in chief of the Army and Navy of

the United States, and of the militia of the several States, when called into the actual service of the United States \* \* \*.

Amendment II. A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Amendment V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger \* \* \*.

Plaintiffs in error submit various and contradictory contentions based on the clauses quoted. Summarized, the argument runs as follows: Plaintiffs in error, although not in the organized, are members of the unorganized militia, therefore they may be called only as militiamen and for militia duty. Constitution, Art. I, sec. 8, cl. 15. If militiamen of the States may be placed in the National Army, rights reserved to the States to maintain the militia, appoint the officers, and train the local forces in accordance with the discipline prescribed by Congress, are infringed Amendment X; Art. I, sec. 8, cl. 16; briefs in Nos. 663-666, pp. 16, 18; brief in No. 656, pp. 30, 32; R. No. 680, p. 271; R. No. 681, pp. 7, 35; brief No. 702, p. 78.

Furthermore, they may be called as militiamen only for three purposes: To execute the laws of the United States, to suppress insurrections, and to repel inva-

sions. Specifically, they can not be sent out of the country. The Selective Draft Law calls the militia for purposes unauthorized by the Constitution. Briefs in Nos. 663-666, pp. 18, 19.

**1. A citizen is not exempt from military service in the National Army merely because he is also a militiaman.**

(a) **The power granted to Congress over the militia of the States, Constitution, Art. I, sec. 8, cl. 15, 16, is not in limitation but in extension of the power to raise an army, cl. 12.**

The clauses of Article I, section 8, of the Constitution constitute a charter of the powers conferred upon the National legislature. Each grant is distinct from and additional to the others. Congress may raise an army. It may also provide for calling forth the militia. There can be no ambiguity here.

The two powers are not inconsistent with each other, but are complementary. The army is a national organization whose business is war. The militia is a State institution, *infra*, p. 46, composed of the able-bodied citizenry, who devote practically their entire time to ordinary civilian pursuits. The Army is for use in a national crisis, trained and disciplined for service against hostile power until the war is concluded. The militia is an enlarged *posse comitatus*, primarily for use in time of local disturbance, and for a period of only a few months. Upon the State devolves the duty to maintain and train the militia. The State is expressly prohibited from establishing an army. Constitution, Art. I, sec. 10.

The complementary character of the two distinct powers is seen from the reasons for investing Congress with them. It was desired not to limit the power of the National Government over the army, but to make its existence subject to the control of the representatives of the people by restricting appropriations for only two years' use and to limit the occasions requiring the maintenance of an army in time of peace. Opposition from the descendants of Englishmen who had not forgotten the armies maintained by the Stuart kings in time of peace greeted the proposal to vest the National Government with power over "the bulwark of the citizen's liberties." 3 Elliot's Debates, 384; Farrand's Records of the Federal Convention, vol. 3, pp. 207, 209. The answer was obvious that the Constitution did not provide for uncontrolled power of the Executive, and that there was no more ground to fear abuse of the power by representatives of the people in national assembly than in the local legislatures. Federalist, No. 25, p. 164. Given the power to call the militia of the States for local disturbances, the necessity for the maintenance by the National Government of a large standing army in time of peace is obviated. Supp. to Elliot's Debates, 466, 467. Given also the power to maintain armies, the National Government is not always under the necessity of calling upon citizens to leave their customary occupations, involving loss of time and labor and the expense incident to frequent rotation of militia service. Again, it was clear that untrained militia forces, though courageous, may in emergency not be sufficient

to cope with hostile disciplined troops. *Federalist*, Nos. 24, 25; Upton, "Military Policy of the United States," pp. 13, 15, 45, 101; see *McClaughry v. Deming*, 186 U. S. 49, 57.

The history of the times (*supra*, p. 24) reinforces the plain language of the Constitution that the insertion in that instrument of power to use the militia was not intended to abrogate the power to raise armies. The proportion of each organization and the means for raising both are for Congress to determine. See *Federalist* Nos. 22 to 29; *Burroughs v. Peyton*, 16 Gratt. 470, 482.

**(b) The draft of a citizen into the armed forces of the United States infringes no reserved right of the States over the militia.**

It is contended that the militia is an institution of the States; that if the Federal Government may make wholesale draft upon militiamen the State institution may be wiped out.

There is no doubt that the militia recognized in the Constitution is a State institution. This is shown not only by the reserved authority over it when not employed in the service of the United States (Art. I, sec. 8, cl. 16), but by the express language in Article II, section 2, clause 1, as follows:

The President shall be Commander in chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

Prior to the adoption of the Constitution each of the States maintained its own militia. The States

have legislated concerning the militia establishment and organization since the beginning of the Government. It is thoroughly settled that such regulations, in the absence of congressional regulation to the contrary, are valid. *Presser v. Illinois*, 116 U. S. 252; *People ex rel. v. Hill*, 126 N. Y. 497, 503, 504; *Lanahan v. Birge*, 30 Conn. 438; *Dunne v. People*, 94 Ill. 120. In *Houston v. Moore*, 5 Wheat. 1, a conviction under a Pennsylvania statute of a militiaman who failed to respond at the point of rendezvous upon call into the service of the United States was held valid. Until he reported at the rendezvous the militiaman was regarded as in the control of the State (see pp. 21, 51). When the militia of the States is called out the militiamen as individuals are not directly addressed, but the call may be directed to the governor of the State or subordinate commanding officers of the militia (5 Wheat. 15; see act May 27, 1908, c. 204, 35 Stat. 399).

The argument from State sovereignty, however, goes too far. If its validity is admitted the grant of power to Congress "to raise armies" is practically nullified. It may be that an effective army can not be raised by voluntary enlistment. Power to make war and raise armies is a power to command, not to contract. If dependent on consent of individuals it is no power at all.

If the National Government can not draft citizens of the United States, who are also citizens and militiamen of the States, by the same token it is denied the power to accept volunteers who are State militia-

men. For if the entire State militia may be drafted, so also may the entire State militia voluntarily enlist. A private citizen can not, of course, grant away the sovereignty of the State. It may be said that the entire State militia would not voluntarily enlist. But if drafting part of the State militia is to be held invalid because later the whole may be drafted, by parity of reasoning voluntary enlistment of part is unconstitutional. *Ex parte Coupland*, 26 Tex. 386, 396; *Burroughs v. Peyton*, 16 Gratt. 470, 482. The ranks of the National Army must then be reduced to boys under 18, men over 45, and foreigners.

In the cases in the courts of the Confederate States during the Civil War which sustained the power of the Confederate Congress to conscript citizens of the Southern States, the point was insisted upon by members of the States' militia that the States' rights were being infringed. The contention was in each case denied. *Ex parte Coupland*, 26 Tex. 386, 396, 402; *Burroughs v. Peyton*, 16 Gratt. 470, 475, 483, 484, 485; *Jeffers v. Fair*, 33 Ga. 347, 351, 353; *Ex parte Tate*, 39 Ala. 254, 268; *Barber v. Irwin*, 34 Ga. 27, 37.

In *Simmons v. Miller*, 40 Miss. 19, 26, it was pointed out that if the national power over the citizens is subservient to the State's rights over militia, then the National Government is in the helpless condition of the Confederation, which it was one of the prime objects of the Constitution of the United States of 1787 to avoid.

In *Jeffers v. Fair*, 33 Ga. 347, the court, in disposing of the contention that to allow the National

Government to draft the militia interferes with the right of the States to appoint officers thereof, said (p. 353):

The simple and obvious reply is that the status of the citizen is not merged in the militiaman; that the fact of enrolment with the militia does not exempt him from other duties and liabilities of citizenship.

In *Ex parte Bolling*, 39 Alabama 609, the Supreme Court of Alabama disposed of the contention as follows (p. 610):

We have heretofore held, that the conscript laws are constitutional, (*Ex parte Hill*, 38 Ala. 428,) and we have also ruled, that when the lawful call of each government, Confederate and State, to perform military service, falls on the same person, the claim and call of the Confederate States must prevail over the claim and call of the State government, on the ground that the constitution of the Confederate States, and the laws made in pursuance thereof, are the supreme law of the land.

The same view of the contention was taken by the Supreme Court of Pennsylvania in a case arising under the Conscription Law of Congress of 1863, in *Kneedler v. Lane, supra*, 45 Pa. St. 238, 282, 322.

If there be conflict, therefore, between the State's rights over the militia and the national power to raise an army, the national power must prevail.

But there is no conflict in fact. Throughout our history the National Government has not impaired the right of the State to keep up its own militia.

Under the present Selective Draft Law only an inconsiderable portion of the militia of the States as a whole are drawn into the National forces. The citizens of the States are withdrawn from possible call for State militia service only temporarily, during the period of the existing emergency. Act of June 15, 1917, Pub. No. 23, 65th Cong., sec. 4, p. 41. The purpose of their withdrawal is in defense of all of the States.

The right of the States to organize and train the militia remaining has been recognized and safeguarded by the National Government. Act of June 14, 1917, Pub. No. 22, 65th Cong.; National Defense Act of June 3, 1916, 39 stat. 166, 198, sec. 61. The act of June 14, 1917, entitled "An act to authorize the issue to States and Territories and the District of Columbia of rifles and other property for the equipment of organizations of home guards," authorizes the Secretary of War during the existence of the emergency to issue to the several States

for the equipment of such home guards of the character of State police or constabulary as may be organized by the several States and Territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several States and Territories and the Commissioners of the District of Columbia or other State troops or militia \* \* \* rifles [and other equipment as] shall be received for by the governors of the States and Territories \* \* \* *Provided*, That all home

guards, State troops and militia receiving arms and equipments, as herein provided, shall have the use, in the discretion of the Secretary of War, and under such regulations as he may prescribe, of rifle ranges owned or controlled by the United States of America.

The home guards or militia here referred to are of the character of local organizations mentioned in section 61 of the National Defense Act of June 3, 1916, which provides:

That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace: *Provided further*, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary.

Far from attempting to interfere with the right of the States to organize, train, and call citizens for local militia service, these acts expressly provide for aiding the States therein by lending rifles and other equipment.

Already statutes have been passed in many States providing for calling out members of the unorganized militia for State service when the members of the National Guard are in the forces of the United States.<sup>1</sup>

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<sup>1</sup> Georgia, Laws 1916, pp. 158, 160, 161, secs. 2, 9, 10, 11.

Illinois, Laws 1917, act June 25, 1917, secs. 1, 2, pp. 782, 783.

Louisiana, Laws 1915-16, No. 264, secs. 5, 9, 70, pp. 540, 542, 548.

Maine, R. S. 1916, c. 15, secs. 9, 10, pp. 296, 298, 299.

**2. Constitutional restrictions concerning militia service are not material in these cases because the duty enforced by the Draft Law is not that of militiamen but of citizens.**

**(a) Plaintiffs in error were drafted not as militiamen but as citizens of the United States.**

The Selective Draft Law is entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States." It provides in section 1 for, first, increasing the increments of the Regular Army; second, for drafting those persons then serving as members of the National Guard; and, third, for drafting an additional force of 500,000 enlisted men. The Regular Army is being recruited by voluntary enlistment. Plaintiffs in error do not claim to be members of the National Guard. Hence their objection must be to the third method of increasing the Military Establishment—the draft. The draft is not based upon the liability to perform militia duty. On the contrary, section 2 provides:

Such draft as herein provided shall be based upon liability to military service of all

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Maryland, Laws 1917, act June 17, 1917, ex. sess., c. 26, sec. 91, p. 62.

New Hampshire, Pub. Acts and J. Res. 1917, c. 123, sec. 4, p. 52; c. 144, p. 64; c. 197, p. 98.

New York, Laws 1916, vol. 3, c. 568, p. 1862, sec. 9.

North Carolina, Pub. Laws 1917, c. 200, secs. 10, 47, pp. 352, 353, 360-361.

Oregon, Gen. Laws 1917, c. 327, secs. 3, 4, 11, 13, pp. 655, 657.

Washington, Laws 1917, c. 107, sec. 1, 9, pp. 361, 364, 365.

male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive.

While the act calls for men only between the ages of 21 and 31, the militia of the various States comprises men between the ages of 18 and 45. National Defense Act of June 3, 1916, c. 134, 39 Stat. 166, 197, sec. 57. There are certain well-known methods of calling out the State militia into the service of the United States. In the statutes under which Congress has in the past made provision for calling the militia the words are addressed expressly to the militia.<sup>1</sup>

Counsel in cases Nos. 680, 681, 709, admit "that the law does not call the militia" (R. No. 681, p. 35; No. 680, p. 271). In the *Kramer* case counsel

<sup>1</sup> Congressional statutes authorizing the President to call out the militia of the States:

- Act Sept. 29, 1789, c. 25, 1 Stat. 95, 96.
- Act Apr. 30, 1790, c. 10, 1 Stat. 119, 121, sec. 16.
- Act May 2, 1792, c. 28, 1 Stat. 264.
- Act May 9, 1794, c. 27, 1 Stat. 367.
- Act Nov. 29, 1794, c. 1, 1 Stat. 403.
- Act Feb. 28, 1795, c. 36, 1 Stat. 424.
- Act June 24, 1797, c. 4, 1 Stat. 522.
- Act Mar. 3, 1803, c. 32, 2 Stat. 241.
- Act Apr. 18, 1806, c. 32, 2 Stat. 383.
- Act Mar. 30, 1808, c. 39, 2 Stat. 478, 479.
- Act Apr. 10, 1812, c. 55, 2 Stat. 705, 706.
- Act May 13, 1846, c. 16, 9 Stat. 9.
- Act July 29, 1861, c. 25, 12 Stat. 281.
- Act July 17, 1862, c. 201, 12 Stat. 597, sec. 1.
- Act Jan. 21, 1903, c. 196, 32 Stat. 775, 776, sec. 4.
- Act May 27, 1908, c. 204, 35 Stat. 399, 400, sec. 3.

stated in the court below "that the conscription law calls, therefore, for the men of the State into the service of the United States, but it does not call on the Governor to provide militia" (R. No. 680, p. 10).

It is argued that since section 57 of the National Defense Act of 1916 designates all able-bodied male citizens between the ages of 18 and 45 as militiamen the Selective Draft Law is a call upon militiamen for militia service. The section referred to provides:

The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

In thus treating of the men liable to call for militia service Congress clearly did not intend to relinquish its power to call citizens for service in the National Army. As section 57 states, men between 18 and 45 are liable to militia duty. The Selective Draft Law provides that men between 21 and 30 are subject to military service in the National Army. Section 57 of the act of 1916 throws no light on the subsequent statute.

(b) **Members of the National Guard are called not as militiamen but as citizens of the United States.**

It may be urged that although the increase in the Regular Army recruits and the additional force of 500,000 drafted men provided by the Selective Draft Law are not called as militia, the National Guard was the Organized Militia of the States and was called out as such. This also is incorrect.

Section 1 of the act provides:

That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

\* \* \* \* \*

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

The authority is not to call into service militia organizations. It is to call any of the members of the militia. Authority extends to drafting any or all of

such members. "Said members so drafted \* \* \* shall serve." Again, the members drafted are to be organized and officered. National Guard organizations are already organized and officered. Furthermore, the draft is specified to be in accordance with section 111 of the National Defense Act of 1916, which provides that "persons so drafted, shall from the date of their draft, stand discharged from the militia." This section reads as follows:

When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, \* \* \* draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct.

Section 101 of the National Defense Act of 1916, 39 Stat. 208, on the other hand, makes express provision for calling the National Guard as State militia. This section provides:

The National Guard when called *as such* into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. (Italics ours.)

It is true that section 1, paragraph 2, of the Selective Draft Law, *supra*, contains a proviso which refers to organizations or units of the National Guard. The proviso, however, does not change the effect of the purview of the paragraph. The clause "when so drafted" refers to the preceding words "any or all members." It does not qualify the subsequent words "organizations or units of the National Guard." The law provides that when any or all members of the National Guard are drafted they shall be embodied into organizations, and any force of training cadres may be transferred to any other force (sec. 2). Section 2 further provides:

Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

The same injunction is contained in section 7:

*Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall so far as practicable be grouped into units by States and political subdivisions of the same.

The three provisos are *in pari materia*. Members of the National Guard may be drafted. When detached they are to be embodied into organizations of men from the same locality, being grouped together. The organization so made up according to section 1, paragraph 2, now under consideration, shall, "so far as practicable, retain the State designations of their respective organizations." This proviso patently deals with nomenclature. The organizations spoken of are not the old organizations of the National Guard but the new units embodying any or all National Guard members and others transferred. The qualifying clause "so far as practicable" indicates that this is the proper construction of the proviso.

In *United States v. Sugar*, 243 Fed. 425, the district court in disposing of a similar contention said (p. 439):

If the federal government has, as there can be no doubt that it has, the power to draft into the military service of the United States any of its citizens, surely it has power to draft such citizens, notwithstanding the fact that they may previously have been members of the National Guard. Otherwise, it would be in the power of any state or of its citizens to easily evade or nullify any attempt of the

federal government to exercise this power and such power might be wholly nugatory.

As to the power to select from the body of the citizenship those who are members of the National Guard, there can be little doubt. Such a selection is not arbitrary. Having been trained to military service, it is both reasonable and prudent to choose them among the first in increasing the Military Establishment. In an able article in 30 Harv. Law Rev., 712, Maj. S. T. Ansell (now Brigadier General and Acting Judge Advocate General) states (p. 715):

Throughout our history the States have recognized the feasibility of parting with their organized militia when a national crisis has demanded it. In the Civil War the States parted first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the Confederacy during that period. In the War with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the Nation allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The article concludes with the following adequate language (p. 723):

A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or re-

serve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Of course, in a strict sense, none of the present plaintiffs in error is entitled to raise these objections. No one of them is affected by the constitutional point presented. None of the plaintiffs in error is a National Guardsman. Persons drafted in the army of 500,000 are not entitled to present the rights of National Guardsmen.<sup>1</sup> Even in the conspiracy cases, Nos. 680, 681, 702, the point is improperly raised, because the conspiracy charged was to violate those provisions of the draft law dealing with enrollment. The provision as to National Guard is separable. See *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

**3. Assuming arguendo that plaintiffs in error are called as militiamen and are ordered abroad, they can not obtain relief in the courts.**

We assume for the purpose of argument, wholly contrary to the facts, that the national authorities

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<sup>1</sup> In case the question were properly raised by a National Guardsman, the further consideration may be presented that under the terms of his oath, secs. 70, 71, by which he agrees to obey the orders of the President, to serve under conditions prescribed by law, and to defend the United States against all enemies whomsoever, he has expressly waived his alleged right as militiaman to remain in the country.

have called out the Organized Militia of the States and that plaintiffs in error as members thereof have been ordered to respond. They assert that there is no need for a militia force to execute the laws of the Union, suppress insurrection or repel invasion, and that they can neither be sent abroad nor ordered out at all.

It has long been settled, however, under our scheme of constitutional government and the statutes, that the power resides in only one person to decide when the emergency arises which justifies the calling out of the militia; that person is the Commander-in-Chief, the President of the United States. *Martin v. Mott*, 12 Wheat. 19, 31, 32; *Luther v. Borden*, 7 How. 1, 44. It is not even for the governor of the State, much less a private militiaman, to say that the President has wrongly decided. We recognize the constitutional limits on the power of the President to call out the militia. Attorney General Wickersham advised President Taft in an opinion rendered February 17, 1912, that the militia can not be used as part of the Regular Army in a foreign land in time of peace. 29 Op. Atty. Gen. 322. The legal adviser of the Commander-in-Chief, however, was called upon to consider a different question from that which is presented to the court in these cases. The President, of course, should be scrupulously careful not to exceed the bounds of his constitutional authority. But the matter is solely within his discretion, and from a decision made in exercise thereof no appeal lies to the courts. Correc-

tion for possible abuse is in the power of impeachment and frequent elections.

On the facts in the present cases, moreover, it certainly could not be said that the Commander-in-Chief has exercised his discretion unwisely. A mass of evidence may have persuaded him that the German military authorities had well-matured plans to conquer the armies of our present Allies and then invade our shores in order to compel us to pay the expenses of their adventure of aggrandizement. Evidence to this effect is now not altogether lacking to the public.<sup>1</sup>

In Mr. Wickersham's opinion of February 17, 1912, *supra*, it was said (p. 324):

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<sup>1</sup> This seems to have been the opinion of Ambassador Gerard. 55 Cong. Rec., p. 1162.

Admiral Von Goetz, of the German Navy, is reported by Admiral Dewey to have stated during the Spanish-American War as follows:

"About 15 years from now my country will start her great war. She will be in Paris about two months after the commencement of hostilities. Her move on Paris will be but a step to her real object—the crushing of England. \* \* \* Some months after we finish our work in Europe we will take New York, and probably Washington, and hold them for some time. We will put your country in its place, with reference to Germany. We do not propose to take any of your territory (?), but we do intend to take a billion or so of your dollars from New York and other places. The Monroe doctrine will be taken charge of by us, as we will then have to put you in your place, and we will take charge of South America, as far as we wish to. \* \* \* Don't forget this, and about 15 years from now remember it, and it will interest you." (Naval and Military Record, No. 33, Vol. LII, p. 578; see 55 Cong. Rec., 8178.)

The term "to repel invasion" may be, in some respects, more elastic in its meaning. Thus, if the militia were called into the service of the General Government to repel an invasion, it would not be necessary to discontinue their use at the boundary line, but they might (within certain limits, at least) pursue and capture the invading force, even beyond that line, and just as the Regular Army might be used for that purpose.

The power to repel invasion includes the power to do so effectively. *Martin v. Mott*, 12 Wheat. 19, 29. If, in the easily admitted case, the militia may be sent a few miles beyond the boundary lines of the territory of the United States under this power, it may be sent a few thousand miles as the necessary and effective means of repelling a threatened invasion.

### III.

#### **THE SELECTIVE DRAFT LAW IMPOSES NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE.**

Soon after the law now in question was approved the Supreme Court of California held in *Claudius v. Davie*, 165 Pac. 689, that "the claim that the law imposed slavery or involuntary servitude is utterly without merit." This was in a memorandum opinion on an application for a writ of prohibition against a State officer to prevent enforcement of the law. All those courts which have since considered the question (*supra*, p. 34) have expressed the same justifiable impatience with the suggestion.

If the citizen owes a duty to render military service, the Thirteenth Amendment does not interfere with its enforcement. The amendment was the result, not as counsel in the *Arver* case, with some imagination, assert, of the opposition of the people to the draft, but of a desire to banish forever the well-known forms of chattel slavery and the involuntary servitude akin thereto. It was not intended to destroy those powers of government necessary to be exercised to secure citizens the blessings of liberty. The argument of counsel is that the Thirteenth Amendment, designed to make citizens free, should, by denying the power of effective opposition, be molded into an instrument to make them slaves of a foreign power.

No better language can be employed in explaining the relation of the amendment to exceptional duties owed to the State than that of this court in *Butler v. Perry*, 240 U. S. 328, holding that a State may compel labor upon the public roads. It was there said (pp. 332, 333):

Utilizing the language of the Ordinance of 1787, the Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with

respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers. *Slaughter House Cases*, 16 Wall. 36, 69, 71, 72; *Plessy v. Ferguson*, 163 U. S. 537, 542; *Robertson v. Baldwin*, 165 U. S. 275, 282; *Clyatt v. United States*, 197 U. S. 207; *Bailey v. Alabama*, 219 U. S. 219.

In *Robertson v. Baldwin*, 165 U. S. 275, the sections of the Revised Statutes providing that justices of the peace might arrest deserting seamen, compelling them in effect to labor in accordance with their shipping articles, were sustained against an attack that they violated the Thirteenth Amendment. This court said (p. 282):

It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards.

In *Tucker v. Alexandroff*, 183 U. S. 424, in which the arrest of a deserting conscript in the Russian navy was held proper as in accordance with the Russian treaty of 1832, no question was raised that the Thirteenth Amendment was in any way violated.

In *Clyatt v. United States*, 197 U. S. 207, where peonage was held contrary to the Thirteenth Amendment, this court said (p. 216):

We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson v. Baldwin*, 165 U. S. 275, or the obligation of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme case.

The records abound with examples of compulsory public service. A public officer can not resign when he will. *Edwards v. United States*, 103 U. S. 471. One duly elected may be compelled to serve by mandamus. *People ex rel. German Insurance Co. v. Williams*, 145 Ill. 573. Failure in this regard is a criminal offense at common law. See cases cited in *People ex rel. v. Williams, supra*, p. 578. Employees in a public service business, by reason of the relation into which they have entered and the peculiar and overwhelming public interest in its continuance at certain times, may be required, for a reasonable period, to continue at their posts. *Wilson v. New*, 243 U. S. 332, 351. In the 15th century Englishmen were impressed to build a wall to keep out the sea. Barrington's *Observations on Ancient Statutes*, 396. South Carolina in 1778 required the inhabitants of the neighborhood to labor in clearing a river. *South Carolina Statutes at Large*, vol. 7, p. 524. From time immemorial citizens have been compelled

to serve on juries. *In re Appeal of Scranton*, 74 Ill. 161; *Bragg v. People*, 78 Ill. 328, 330. They may be required to join the *posse comitatus*; to go to the tax office. Children may be compelled to go to school. *State v. Bailey*, 157 Ind. 324. Witnesses may be forced to appear. United States Constitution, Sixth Amendment; *Israel v. State*, 8 Ind. 467. Attorneys must defend accused persons without compensation. *Vise v. County*, 19 Ill. 78; *Rowe v. Yuba County*, 17 Calif. 61. Reports involving labor, little and vast, may be required. Physicians in some States must report births. *Robinson v. Hamilton*, 60 Iowa 134; pawn-brokers make daily report of pledges. *Launder v. Chicago*, 111 Ill. 291. Railroads may be required to render monthly return of violations of 16-hour law; *Balto. & Ohio R. R. Co. v. Int. Com. Comn.*, 221 U. S. 612; and to make annual reports involving much detail and labor; *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423.

Counsel in the *Arver* case No. 663 (brief, 34) list eleven instances of peculiar service said not to be covered by the Thirteenth Amendment, and comment upon them. We do not attempt to cover the bounds of history, nor to enumerate all the exceptional cases sanctioned by immemorial usage, nor, being unable to forecast the extent of the public necessities in analogous cases in the future, do we try to embrace all instances of service which the citizen may be required to render his Government. The striking fact is that in many cases in which compulsory service has been regarded as exceptional, the analogy to

which reference is made as a fact universally admitted, is that of compulsory military service. A typical passage is *In re Dassler*, 35 Kansas, 678, in which compulsory labor on the public roads was held not to contravene the Thirteenth Amendment. The court said (p. 684):

Such labor has never been regarded or construed by any of the authorities as falling within the terms of the constitution prohibiting slavery and involuntary servitude. Militia service is also compulsory, and if the theory of the petitioner is correct, such service, when involuntary, is within the terms of §6 of the bill of rights, and the thirteenth amendment to the constitution of the United States. Such however is not the case, and we do not think that art. 8 of the constitution of this state conflicts in any way with §6 of the bill of rights or with the thirteenth amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto; among these services are labor on the streets or highways, and training in the militia.

See also *Bragg v. People*, 78 Ill. 328, 330; *Hoke v. Henderson*, 4 Dev. (N. Car.) 1, 29; *State v. Wheeler*, 141 N. Car. 773, 777; *People ex rel. German Ins. Co. v. Williams*, 145 Ill. 573, 583.

An instructive precedent may be found in the legislation affecting the Northwest Territory, important under the reasoning of this court in *Butler v. Perry*, *supra*, p. 332. It seems the first appearance of the lan-

guage "neither slavery nor involuntary servitude" was in Jefferson's handwriting in 1784.<sup>1</sup> Jefferson was at that time on a committee of Congress to provide for the government of the Northwest Territory. The Writings of Jefferson, Ford's ed., vol. III, pp. 407, 410, 428, 429; Thorpe, Constitutional History of the United States, vol. I, p. 261. The language is adopted in the Northwest Ordinance of 1787, art. 6, 1 Stat. 53. Other sections of the Northwest Ordinance are as follows:

The governor for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by Congress. (1 Stat. 51.)

Art. II. \* \* \* No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the

<sup>1</sup> Evidently the author did not believe that the language prohibited compulsory military service, for Jefferson presented a conscription bill to the Virginia legislature in 1777; and in his Annual Message to Congress on December 3, 1805, he recommended universal compulsory training. Jefferson's Works, Ford's edition, vol. 2, p. 123; vol. 8, pp. 384, 392. He explained his recommendation in a letter to General Kosciusko February 26, 1810. Jefferson's Works, Washington edition, vol. 5, pp. 506, 507:

"Two measures have not been adopted, which I pressed on Congress repeatedly at their meetings. The one \* \* \* the other was to class the militia according to the years of their birth, and make all those from 20 to 25 liable to be trained and called into service at a moment's warning."

land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. (1 Stat. 52.)

Very soon after the creation of the Northwest Territory laws requiring personal militia service were passed. Chapter 1 (published July 25, 1788) of the "Laws of the Territory Northwest of the River Ohio from the Commencement of the Government to the 31st of December, 1791," page 3 (Chase, Statutes of Ohio, vol. 1, p. 92), provides:

§ 1. All male inhabitants between the age of sixteen and fifty, shall be liable to and perform military duty, and be formed into corps in the following manner.

All male inhabitants were required to be armed and equipped, and to assemble on the first day of each week, and as the Commander-in-Chief might direct. Chapter 8 of the above laws, page 30 (Chase, Statutes of Ohio, vol. 1, p. 102), passed November 23, 1788, required the officers of the militia to enroll all persons obliged to do military duty. A further amendment of July 2, 1791, chapter 23, page 66 (Chase, Statutes of Ohio, vol. 1, p. 113), provided that the captains of each company should order an assembly on the last day of every week in the year to exercise his company for two hours. These laws were reenacted September 16, 1799 (Chase, Statutes of Ohio, vol. 1, c. 86, p. 211).

A comprehensive militia law, repealing the former statutes dealing with the militia, was enacted December 13, 1799. Ch. CV, Statutes of Northwest Territory, contained in vol. 1 of Chase's edition of Statutes of Ohio, p. 245. Section 1 of this statute provides:

That each and every free, able bodied, white male citizen, of the territory, who is or shall be of the age of eighteen years, and under the age of forty-five years, except as is hereinafter excepted, shall severally and respectively be enrolled in the militia \* \* \*.

Provision is made in the law for calling forth the militia by classes. Secs. 16, 33, 35, 36.

Compulsory military service thus was not regarded in the Northwest Territory as "involuntary servitude." The Northwest Ordinance itself, which uses the language of the Thirteenth Amendment, also provides for militia service and for other particular compulsory personal service when necessary "for the common preservation." It is just as clear now as it was in 1787 that both classes of service rendered in performance of duties to the State are not slavery nor akin thereto.

#### IV.

##### **THE ACT IS NOT UNCONSTITUTIONAL ON THE GROUND THAT STATE OFFICIALS AID IN ITS ENFORCEMENT.**

Counsel for plaintiffs in error in the *Arver, Grah, O. Wangerin*, and *W. Wangerin* cases, Nos. 663, 664, 665, 666, present as their third point that the pro-

visions that State officials aid in the enforcement of the act are contrary to section IV of the Constitution and Article X of the amendments. Apparently the contention is (1) that the State loses its republican form of Government; and (2) its reserved rights under the Constitution are infringed. Briefs, pp. 40, 43, 48.) These points are not presented by plaintiffs' demurrer to the indictment, nor in the specifications of error in this court. Brief, p. 4.

The contention as to the guaranty of a republican form of Government is so wholly without merit as to justify no discussion. Moreover, the courts have no jurisdiction to consider it. *Luther v. Borden*, 7 How. 1; *Pacific Telephone Co. v. Oregon*, 223 U. S. 118.

As to the point that the State officials may not be required to aid in the enforcement of the law, plaintiffs in error are in no better position to raise the question. They are not State officials themselves nor is any State official here objecting. No statutory or constitutional provision of any State is cited as being infringed. If and when State officials appointed to carry out the Selective Draft Law do not voluntarily aid in the execution of the Federal law, questions as to the invasion of their rights and the State's sovereignty may properly be considered.

In executing the Federal law, however, State officials are *pro hac vice* Federal officials. It is settled that power may be conferred upon State officers as such to execute duties under an act of Congress in absence of contrary statutory or constitutional pro-

visions of the State. *Prigg v. Penna.*, 16 Pet. 539, 622; *Robertson v. Baldwin*, 165 U. S. 275; *Levin v. United States*, 128 Fed. 826. This principle was applied in *Dallemagne v. Moisan*, 197 U. S. 169, where an arrest of a sailor in accordance with treaty provisions by a State policeman was held valid.

During the Civil War the act of July 17, 1862, c. 201, 12 Stat. 597, calling out the militia was administered largely by State officials upon request of the President. It was held that Congress had power to authorize the State officers so to act, and that officers acted correctly in exercising the authority delegated. *In re Spangler*, 11 Mich. 298; *In re Griner*, 16 Wis. 423, 433; *Druecker v. Salomon*, 21 Wis. 621, 625; see *Allen v. Colby*, 47 N. H. 544.

In *Claudius v. Davie*, 169 Pac. 689, the Supreme Court of California refused to grant a writ of prohibition to prevent State officials from enforcing the draft law now in question.

As a matter of fact, it is highly consonant with the maintenance of local government in its full vigor, with the preservation of the rights of the State and of the individuals in different communities, that the law be understandingly administered by denizens of the respective communities, rather than by an extensive force of Federal officials.

## V.

**THE ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY  
TO ADMINISTRATIVE OFFICIALS.**

This matter is discussed by counsel for plaintiffs in error in cases Nos. 663, 666, briefs, pp. 49 to 55. (Counsel in the *Ruthenberg* case, No. 656, also raise the point, brief, p. 31.)

The Selective Draft Law makes legislative provision for an army with which to prosecute the war. The general rules for increasing the military establishment are prescribed. As to the draft, the statutory provisions are as specific as is reasonably practicable. The rule is laid down of universal liability to military service for all male citizens between the ages of 21 and 30 years. (Sec. 2.) Men are to be called upon the principle of selective service, so that the entire resources of the Nation may be most effectively marshaled. Classes of exemptions are detailed in section 4 with this purpose in view. The President merely executes the legislative will. Large discretion in administration is of course absolutely essential. Such matters as the particular number of men required to meet shifting needs and the kinds of organizations into which they may most effectively be placed are administrative details peculiarly appropriate for the exercise of the discretion of the commander in chief, and particularly inappropriate for the inelastic decision of the deliberating legislative body.

The law is thoroughly well settled by the decisions of this court. At the last term, the section of the Reserve Bank Act authorizing the Federal Reserve Board "to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds" was sustained. *First National Bank v. Union Trust Co.*, 244 U. S. 416. This section is less specific as to the method of applying general rules than is the present law. The court, speaking through Mr. Chief Justice White, said (p. 427):

\* \* \* we think it necessary to do no more than say that a contention which was pressed in argument \* \* \* that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470; *United States v. Grimaud*, 220 U. S. 506; *Monongahela Bridge Company v. United States*, 216 U. S. 177; *Intermountain Rate Cases*, 234 U. S. 476.

The act of July 17, 1862, c. 201, 12 Stat. 597, which authorized the President, in calling out the militia of the States, to provide the entire body of procedure in those States which had no statutory provisions on the subject, was enforced in *In re Griner*, 16 Wis. 423; *Druecker v. Salomon*, 21 Wis. 621,

625; *In re Spangler*, 11 Mich. 298; *Allen v. Colby*, 47 N. H. 544; see *McCall's Case*, 15 Fed. Cas. No. 8669, p. 1225.

Counsel in the *Minnesota* cases, Nos. 663, 664, 665, 666, are unfortunate in their citation of cases. They cite *United States v. Blasingame*, 116 Fed. 654, and *United States v. Keokuk Bridge Co.*, 45 Fed. 178 (brief, p. 51). The former was expressly overruled in *United States v. Grimaud*, *supra*, 220 U. S. 506, 515. The latter was decided before and is inconsistent with the decisions of this court in *Union Bridge Co. v. United States*, 204 U. S. 364, and *Monongahela Bridge Co. v. United States*, *supra*.

Throughout our history the common method of providing for increase in the land forces has been simply to vest authority in the President to raise the necessary troops. See the following statutes:

- Act March 3, 1791, c. 28, 1 Stat. 222, sec. 8.
- Act May 28, 1798, c. 47, 1 Stat. 558.
- Act March 2, 1799, c. 31, 1 Stat. 725.
- Act Feb. 24, 1807, c. 15, 2 Stat. 419.
- Act March 3, 1807, c. 39, 2 Stat. 443.
- Act Jan. 2, 1812, c. 11, 2 Stat. 670.
- Act Feb. 6, 1812, c. 21, 2 Stat. 676.
- Act April 8, 1812, c. 53, 2 Stat. 704.
- Act July 1, 1812, c. 119, 2 Stat. 774.
- Act Jan. 29, 1813, c. 16, 2 Stat. 794.
- Act Feb. 25, 1813, c. 31, 2 Stat. 804.
- Act July 26, 1813, c. 27, 3 Stat. 47.
- Act Jan. 28, 1814, c. 9, 3 Stat. 96.
- Act Feb. 24, 1814, c. 16, 3 Stat. 98.
- Act Jan. 27, 1815, c. 25, 3 Stat. 193, sec. 3.
- Act May 23, 1836, c. 80, 5 Stat. 32.

Act July 5, 1838, c. 162, 5 Stat. 256.  
Act May 13, 1846, c. 16, 9 Stat. 9.  
Act May 13, 1846, c. 17, 9 Stat. 11.  
Act June 17, 1850, c. 20, 9 Stat. 438.  
Act July 22, 1861, c. 9, 12 Stat. 268.  
Act July 25, 1861, c. 17, 12 Stat. 274.  
Act July 31, 1861, c. 34, 12 Stat. 285.  
Act July 17, 1862, c. 201, 12 Stat. 597, sec. 3.  
Act March 3, 1863, c. 75, 12 Stat. 731.  
Act Feb. 24, 1864, c. 13, 13 Stat. 6, sec. 1.  
Act July 4, 1864, c. 237, 13 Stat. 379.  
Act April 22, 1898, c. 187, 30 Stat. 361, sec. 5.  
Act May 11, 1898, c. 294, 30 Stat. 405.

## VI.

**THE ACT DOES NOT INFRINGE THE PROVISIONS OF THE CONSTITUTION CONCERNING THE JUDICIAL POWER. ARTICLE I, SECTION 8, CLAUSE 9; ARTICLE III, SECTIONS 1 AND 2.**

Counsel in the *Ruthenberg* case argue that the act by authorizing the President to establish in his discretion local boards to determine the inclusion or discharge of individuals or classes of individuals from the selective draft usurps judicial power (No. 656, brief, p. 33).

The boards of exemption do not exercise judicial power. They determine conditions of fact necessary to be ascertained by the Executive in enforcing the law. The boards aid in carrying out the legislative requirements that those subject to the draft who under all the circumstances may best be spared and are best qualified should render military service. Their duties are administrative. Surely it will not

be urged that in order to select the recruits for our defense the Federal courts must first pass upon every claim for exemption while meantime the armies of the enemy progress.

If the boards of exemption usurp judicial power then the board of tea inspectors does likewise in passing upon the quality of tea fit for importation, *Buttfield v. Stranahan*, 192 U. S. 470, 497, to the contrary notwithstanding; then does also the Secretary of the Interior in determining who is an Indian within the terms of a land grant, in spite of *West v. Hitchcock*, 205 U. S. 80. The executive who determines whether an alien is fit physically to enter the United States does not invade the province of the Federal judiciary; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 338-340; see *Fong Yue Ting v. United States*, 149 U. S. 698, 730; nor do the boards of special inquiry in determining the claims for admission of aliens to our shores. In *Union Bridge Co. v. United States*, 204 U. S. 364, this court held that the Secretary of War does not exercise judicial powers in determining whether a bridge is an unreasonable obstruction to navigation (pp. 385, 387).

A contention similar to that now considered was raised in *Zakonaite v. Wolf*, 226 U. S. 272, with reference to the power of executive officials to determine the facts upon which a deportation order of an alien may be based. In a memorandum opinion this court disposed of the contention as follows (p. 275):

The appellant raises some other constitutional objections, viz.: \* \* \* that the

[immigration] act vests judicial powers in an executive branch of the Government \* \* \*. These are without substance, and require no discussion.

## VII.

### THE DUE-PROCESS CLAUSE OF THE CONSTITUTION IS NOT VIOLATED.

Counsel in the *Minnesota* cases, Nos. 663-666, raise the point that the act deprives citizens of all liberty without due process of law "since it assumes to confer upon the President of the United States discretionary and arbitrary powers in the selection of citizens into the draft army" (briefs, pp. 55, 56). It is asserted that citizens may be selected "upon the whim of a State official" (briefs, p. 61). The due process point is raised in the *Jones* case, No. 738 (R. p. 15); in the *Kramer* case, No. 681 (R. p. 35); in the *Ruthenberg* case, No. 656 (brief, pp. 35-37).

There is no charge that the act requires an arbitrary selection of citizens. No complaint is made that the act has been arbitrarily or unfairly administered. The contention is that discretionary powers are granted to the President in its administration to so large an extent that he or his subordinates may act upon their mere caprice.

Nothing in the law justifies this assertion. Large discretionary powers in executing the law are granted and necessarily granted, but the act as a whole provides a fair and orderly method of selection for military service, and forbids the unjust and dictatorial caprice which counsel believe to be authorized.

From the point of view of due process of law, a proceeding is most surely authorized if it was a normal and customary method with the people of this country at the time the Constitution was adopted *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272.

It is true that the law provides for the restraint of the liberty of the citizen to a certain extent. Yet to protect most truly the liberties of people who live together in communities it is plain that some governmental organization and some exercise of governmental powers are necessary. The pioneer on the frontier may be subject to no master. There is no absolute freedom, however, in civilized societies. Our own history prior to the adoption of the Constitution, and the present experience of one of the Allies, vividly show, moreover, that the government which exercises least powers may be the instrument of tyranny in the hands of domestic disturbers, as well as the facile tool of foreign conquerors. The Federalist, speaking to the point in 1787, states (No. 26; pp. 170, 171):

It was a thing hardly to be expected that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between power and privilege, and combines the energy of Government with the security of private rights.  
\* \* \*

The idea of restraining the Legislative authority, in the means of providing for the national defense, is one of those refinements,

which owe their origin to a zeal for liberty more ardent than enlightened. \* \* \* And I am much mistaken, if experience has not wrought a deep and solemn conviction in the public mind, that greater energy of Government is essential to the welfare and prosperity of the community.

Illustrations may be cited without number to show that in order to protect the liberties of the people as a whole the individual citizen may incidentally or temporarily be restrained of his liberties. It was in a case upholding the power of the State to compel vaccination that Mr. Justice Harlan said (*Jacobson v. Massachusetts*, 197 U. S. 11, 29):

The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer v. Louisiana*, 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.

Yet military service, cited as the extreme example of restriction of personal liberty, is only temporary, incidental to the security of the citizens as a whole, and only so far imposed as is necessary for the purpose. The few who are compelled to serve do so that the many who remain at home at the present time, and the generations who come in the future, may

enjoy those blessings of freedom which this Government was established to secure.

### VIII.

#### **THE SELECTIVE DRAFT LAW NEITHER ESTABLISHES A RELIGION NOR PROHIBITS ITS FREE EXERCISE.**

Counsel in the *Kramer* case, No. 681, and in the *Goldman* and *Berkman* case, No. 702, assign as error that the Selective Draft Law

violates Article I of the Amendments of the United States Constitution which reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." (R. No. 681, p. 34.)

The Selective Draft Law exempts from military service

a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant. (Sec. 4.)

This provision has nothing in it "respecting an establishment of religion." The law recognizes the right of every citizen to choose religious affiliations without restriction. It goes so far as to aid

in the free exercise of those religions which forbid participation in war.

Under section 4 also may be exempted "those found to be physically or morally deficient" and those with dependents. It will not be argued that the law establishes a status of physical or moral deficiency, or of financial dependency; nor that freedom to change these conditions is prohibited.

## IX.

### OTHER CONSTITUTIONAL QUESTIONS UNDER THE ACT.

1. Counsel in case No. 702 contend that Article I, section 8, clause 12, of the Constitution is violated in that appropriations for the support of the army are made for more than two years (brief, p. 90). Probably counsel did not notice that the Selective Draft Law which is now in question makes no appropriation whatsoever.

2. Counsel in the same case assign as error a violation of Article IV, section 2, subdivision 1 (R. No. 702, p. 537). Their brief contains no discussion on this point.

3. They also suggest that the act denies citizens the equal protection of the laws (brief No. 702, p. 96).

The clause in the Fourteenth Amendment guaranteeing equal protection of the laws is addressed not to Congress but to the States. Amendment XIV; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 158, 159.

Granting, however, that Congress were restricted by a similar clause, each of the exemptions pro-

vided by the Selective Draft Law has reason behind it (sec. 4). The law proceeds upon the equitable principle that all citizens are subject to call as their particular services are demanded. Exemptions are provided from direct military service because service in other capacities aids more directly in the successful prosecution of the war.

Exemptions to greater or less extent have been contained in every compulsory military service law passed by the States of the United States (see Appendices "A," "B," "C," *infra*, pp. 123, 131, 133). It is interesting that Quakers and conscientious objectors were frequently exempted during the Revolutionary War:

Virginia, Act July 1775, c. 1, 9 Hening, St. L. pp. 9, 28, 34.

Virginia, Act October 1777, c. 1, 9 Hening, pp. 337, 345.

North Carolina, Laws April, 1778, c. 1, sec. 13, vol. 24, State Records 190, 193.

New Hampshire, Metcalf's ed., vol. 4, pp. 273, 274, Act March 18, 1780, c. 12.

Rhode Island, Laws, February, 1777, pp. 8, 17.

Rhode Island, Laws, October, 1779, pp. 29, 38.

New York, Act April 1, 1777, c. 28, Laws N. Y., vol. 1, 1777 to 1784, pp. 51, 54.

New York, Act April 3, 1778, c. 33, Laws *supra*, pp. 62, 70-71.

New York, Act March 11, 1780, c. 55, Laws *supra*, p. 237, 245.

New York, Act April 4, 1782, 5th sess., c. 27, Laws 440, 449.

Massachusetts, Resolves June 12, 1778, c. 51  
p. 13.

Massachusetts, Laws 1781, c. 21, p. 33.

Massachusetts, Act Mar. 10, 1785, Per-  
petual Laws of Mass. 1780-1789, pp. 338,  
347, secs. 42, 43.

On the other hand, the usual exemption to Quakers  
was not extended in Pennsylvania. See Act of  
March 20, 1780, c. 92, vol. 10, Stat. L., pp. 144, 148.

If the argument against this law upon con-  
stitutional grounds be not frivolous, then that  
adjective has lost its legal significance.

## PART TWO.

### OTHER ERRORS ASSIGNED.

#### No. 656.

**Charles Ruthenberg, Alfred Wagenknecht, and Charles Baker, plaintiffs in error, v. The United States.**

#### STATEMENT.

Defendants Ruthenberg, Wagenknecht, and Baker were indicted with one Schue for violation of section 5 of the Selective Draft Law—Schue's wilful failure to register. Schue pleaded guilty (R. 65, 66). The charge against Ruthenberg, Wagenknecht, and Baker was that they aided, abetted, counseled, commanded, and induced Schue to violate the law (R. 1, 2), sec. 332, Criminal Code, 35 Stat. 1088, 1152, act of March 4, 1909, c. 321, sec. 332.

The facts are in small compass. Schue's testimony was as follows: He was of draft age (R. 50), and would certainly have registered if he had not heard about the Socialist peace meetings and listened to Baker speak at the meeting of May 20, 1917, in the public square in Cleveland, and to the speeches of Wagenknecht and Ruthenberg at the meeting of May 27 (R. 51, 56, 57). Baker announced that all socialists would refuse to register with the full support of the socialist party; that he would rather be shot here as a man than be shot in the trenches of Europe as a dog (R. 51, 52).

At the meeting of May 27, Max Hays, the first speaker, advised compliance with the law (R. 52). Wagenknecht, who followed, said that Hays's attitude did not comply with the standpoint of the socialist party (R. 78, 92). Wagenknecht continued "you can either obey or disobey the law. You can either disobey the law and go to jail or obey it and eat gravel and dust the rest of your life" (R. 53). "We will fight and fight and fight [conscription] until there is no more fight left in us (R. 54).

The stenographic report of Wagenknecht's speeches includes the following (R. 80):

Well, the question is, of course,—you may applaud here this afternoon—but after a bit the question will be this: how many of you will have moral courage enough to refuse to register on June 5th? That's the question. That's the question, friends. The conscription law and its success, understand—the conscription law and its success depends in a measure upon the fact that thousands upon thousands will refuse to register \* \* \*.

Soon after this the speech was interrupted by Wagenknecht's arrest. Ruthenberg then took up the challenge. He said that "if he was of military age and if he was asked to go he would rather have his body riddled with bullets than to submit to this here registration" (R. 55, 56).

Schue's evidence as to the speeches of Baker, Hays, Wagenknecht and Ruthenberg was corroborated by Lind (R. 66, 69), Stucky (R. 70, 71), and Farasey, a court stenographer, who took down the

speeches of Hays, Wagenknecht and Ruthenberg (R. 78-96). The Government's case in its main aspects was corroborated by defendants' witnesses (Bronstrup, R. 102; Fromholtz, R. 110, 112; Wagenknecht, R. 127, 132; Ruthenberg, R. 149).

The theory of the defense was explained by Ruthenberg (R. 157):

I will gladly explain, for the purpose of the court and jury, that I further stated, that rather than be conscripted, rather than be compelled to fight in this war, I would be stood against a wall and riddled with bullets. I might register and still not submit when I was conscripted. That was my position.

(R. 158) You will remember that I did not say to them that they should refuse to register but said that they should refuse to be conscripted, which carried with it the fact that they might well submit to registration, but later they might claim exemption, they might raise all of the objection, and if they were still selected to fight in the army and they had these conscientious objections, which I stated I had, they could then refuse to do this work for the Government.

Q. That is all you ever had in mind?

A. That is my position.

The Court: And did not your statement also carry with it that they might refuse to register?

The Witness: Not necessarily.

The charge of the court was fair, and, if anything, favorable to the defendants. No exceptions

thereto were taken (R. 166, 171). The jury returned a verdict of guilty (R. 171). Now on writ of error we are asked to consider technical questions.

Counsel for plaintiffs in error make 59 assignments of error, which cover 23 pages of the printed record (R. 185-207). This is a violation of rule 35. *Badgers v. United States*, 240 U. S. 391, 394. In their brief all are abandoned except those embraced in 10 specifications of error. We treat them in order of presentation in defendants' brief.

## I.

### **BOTH GRAND AND PETIT JURIES WERE REGULARLY IMPANELED.**

Specifications 1-6 concern rulings on the challenge to the array of the grand and petit juries.

1. The first (brief, p. 4) is that the trial court erred in not sustaining the challenge to the arrays on the ground that defendants were members of the Socialist Party and were without representation on the jury board. Section 276 of the Judicial Code, act of March 3, 1911, c. 231, 36 Stat. 1087, 1164, amended by act of February 3, 1917, c. 27, 39 Stat. 873, requires the names of grand and petit jurors to be placed in the jury box by the clerk of the court and the jury commissioner,

\* \* \* which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known

member of the principal political party in the district in which the court is held opposing that to which the clerk \* \* \* may belong \* \* \*.

It was proved that the jury commissioner was a well-known member of the principal political party in the district opposing that to which the clerk belonged (R. 30).

It is suggested, however, that section 276 is unconstitutional, in not providing for a jury commissioner of the socialist party. The Constitution guarantees the right of "an impartial jury." It leaves to Congress discretion as to the details in securing such impartiality. It would obviously be impracticable to require the presence upon the jury commission of members of all political parties which may spring up.

It is not argued that the political preference of the jury commissioner and of the clerk tended to secure a jury that was not wholly impartial.

2. The second specification of error, that the names in the jury box and those drawn for jury service were exclusively the names of adherents of the Republican and Democratic parties (brief, p. 5), is passed over with little argument (brief, p. 13). The specification asserts violation (a) of section 276 of the Judicial Code and (b) of constitutional rights (brief, p. 5) (R. 38, 185).

Section 276 is satisfied. It provides that the names of the jurors are to be placed in the jury box by the clerk of the court and the jury commissioner, the clerk \* \* \* and said commissioner each to place one name in said box alternately, without reference to party affiliations. \* \* \* (39 Stat. 874.)

This was done. The record discloses that the clerk proceeded without reference to party affiliations of any of the persons that he selected (R. 31). He did not know that there were any names of Republicans or Democrats or Socialists put in either by himself, the jury commissioner, or the latter's predecessor (R. 31). The drawing was publicly made (R. 37), sec. 276, Judicial Code.

There is certainly no legal presumption of bias because the jury lists happen to be made up of Republicans and Democrats. This was not a political election, nor a debate upon the respective merits of political parties. It was a trial for inducing a susceptible young man not to register. In the stronger case, a jury which tries a negro is not disqualified because a negro is not a member thereof. *Martin v. Texas*, 200 U. S. 316, 320-321; *Thomas v. Texas*, 212 U. S. 278, 282.

The case of *Connors v. United States*, 158 U. S. 408, forecloses the defendants on this point. That was a trial for interfering with elections. Among many questions with reference to the politics of the jurors

submitted to them on their *voir dire*, to which the court refused to permit answer, was this (p. 412):

Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?

This court held that it would not disturb the ruling of the lower court, saying (p. 414):

In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it can not be said that the court erred in disallowing it \* \* \*. (415) But no such exceptional circumstances are disclosed by the record, and the court might well have deemed the question—unaccompanied by any statement showing a necessity for propounding it—as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial. \* \* \* If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections.

In *United States v. Eagan*, 30 Fed. 608, in sustaining a demurrer to a plea in abatement, Mr. Justice Brewer said (p. 609):

\* \* \* Neither party affiliation nor religious beliefs nor church adhesion affect the qualifications of a juror, grand or petit. \* \* \*

In the same case Judge Thayer said (p. 612):

\* \* \* The fact that a man is a member of any political party is not a disqualification for jury service in any case, and practically that is all that is stated in the plea by way of disqualification of the five jurors in question. \* \* \*

3. Specification 3 (brief, p. 7) is to the effect that the jury was incompetent because they were property owners and capitalists, hence biased. Of course ownership of property is not a disqualification. The jurors had not the most remote pecuniary interest in the outcome of the trial.

4. Specification 4 (brief, p. 7) is that the fourth ground of challenge should have been sustained, to wit: "That said juries have been selected and drawn exclusively from the eastern division of the northern district of Ohio, instead of from the entire district, contrary to the Sixth Amendment of the Constitution of the United States" (R. 9).

The statutes were complied with. The Judicial Code does not contemplate that jurors shall be returned from every corner of the district. Section 277 (36 Stat. 1164) provides:

Jurors shall be returned from such parts of the district, from time to time, as the court

shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

The court in this case directed that the jurors be taken from the eastern division (R. 36). Probably in the trials in the western division of the district, citizens for jury service are selected from that division so as to comply with the statutory provision that no unnecessary expense be incurred, and the citizens be not unduly burdened. Mr. Miller, clerk of the court, testifying, said (R. 31):

These jurors whose names have been selected are from the Eastern Division and every county in the Eastern Division. I cannot tell you whether every county is represented in the jury box, because a number of names have been drawn out. \* \* \*

The contention is that section 277 is unconstitutional (brief, p. 15). The answer may be found in a mere reading of the sixth amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, \* \* \*.

The Constitution therefore guarantees the right to a jury of the State and district. The jurymen here challenged were unquestionably citizens of Ohio, and resident in the northern district thereof. What more is required?

The constitutionality of section 277 is settled. It represents the law since 1789, having been brought forward from section 802 of the Revised Statutes, and from a clause of section 29 of the Judiciary Act of September 24, 1789. (1 Stat. 72, 88, c. 20.) It was enforced in *Agnew v. United States*, 165 U. S. 36, 43, 44. See *Rosencrans v. United States*, 165 U. S. 257; *United States v. Wan Lee*, 44 Fed. 707; *United States v. Ayres*, 46 Fed. 651. In the latter case Judge Shiras said (p. 651):

It cannot be possible that in framing the sixth amendment congress intended thereby to secure a constitutional enactment requiring juries to be summoned from an entire state or district, and at the same time, by the provisions of the judiciary act, declared that the courts should have the power to direct the juries to be summoned from parts only of the district.

In *United States v. Peuschel*, 116 Fed. 642, the court said concerning R. S. 802 (p. 646):

This statute is almost as old as the government, having been a part of the judiciary act of 1789; and, the courts having acted upon it uninterruptedly for more than a hundred years, its constitutionality cannot now be successfully challenged.

The plain and incurable vice of defendants' argument is its assumption that a defendant is entitled to a jury summoned from every part of the district. \* \* \* The only constitutional right of the defendant is to a jury of which every member is a resident of a county

or locality which, at the time the offense is alleged to have been committed, was a part of the district.

In *Clement v. United States*, 149 Fed. 305 (C. C. A. 8th C.; certiorari denied, 206 U. S. 562), the authorities are reviewed. In *Spencer v. United States*, 169 Fed. 562, R. S. sec. 802 was sustained, the court saying (pp. 565-6):

The large number of counties which compose most judicial districts render it physically impossible to secure one grand juror, and very difficult to secure one petit juror, from each county of each district; hence, in the ordinary administration of the law governing the selection of jurors (section 800 et seq., Rev. St.), it would be impossible to secure a jury composed of one or more members from each county of a district. But in addition to this suggestion of convenience, it is apparent that one of the main purposes of the constitutional provision was to secure a trial by an impartial jury. The details of working out this main purpose were necessarily left to Congress.

See in accord *United States v. Merchants, etc. Trans. Co.*, 187 Fed. 355, 359, 362.

5. What we have said under the preceding point disposes of the fifth specification of error, which complains that certain counties were not represented among the names drawn for grand and petit jury service (brief, pp. 8, 9). In the eastern division of the Northern District of Ohio alone there are nineteen counties. Sec. 100, Judicial Code, 36 Stat. 1087,

1121. Every county, therefore, could not possibly be represented on the petit jury.

The record discloses moreover that the clerk placed in the box from which the drawings were made, names from all the counties of the district (R. 37).

6. Specification 6 (brief, pp. 9, 10) is as follows:

The trial court erred in not sustaining the challenge upon the disclosure that the lists of names for jury service had been improperly selected.

The sole ground of impropriety urged is that (brief, p. 17):

The trial court overruled the challenge, although the evidence disclosed that the clerk in getting names for jury service, instead of making the selection himself, left the selection to common pleas judges within the division.

This is not the subject of any assignment of error in the record. Assignments of error 17 and 18 (R. 190, 191) are based on the same proceedings (brief, p. 10). But the ground of error of assignment 17 is not that the clerk abdicated in performing his functions of jury selection, but as follows (R. 190):

The trial court erred in refusing defendants to show that the names of the grand and petit jurors were chosen from the names of partisans of the Republican and Democratic parties, as is evident from the following testimony:

This is quite a different matter and has already been dealt with (*supra*, p. 90).

Assignment 18 is also a different matter:

The court erred in refusing to permit B. C. Miller to answer in what manner the list of names sent in by Common Pleas Judges, as testified to by him, were selected, as is evident from the following testimony:

Q. Do you know in what manner the list of names that were sent to you from the Common Pleas Judges as you have described, have been selected?

A. Not in detail. Most of the Judges—

Mr. Wertz: I object to that question; it would be hearsay.

The Court: I sustain the objection to that question.

Mr. Sharts: Enter an exception.

The point argued in defendants' brief "IV. Jury lists improperly selected" (p. 17) not being referred to in any assignment of error, violates rule 35 of this court, and need not be further considered. No objection was taken in the court below to the juries on the ground that the names of possible jurors were not selected by the clerk and the jury commissioner. It is not made a ground of the challenge to the arrays (R. 3); nor of the motion to quash (R. 12); nor of the plea in abatement (R. 14). Any objection on that score is therefore waived.

There is nothing of merit in the argument in any event. Section 276 requires the clerk and the jury commissioner to place the names of not less than 300 persons possessing the qualifications of jurors of the

highest court of the State (sec. 275) in the jury box. This was done. The performance of this duty was not delegated.

The Code does not prescribe the manner in which the clerk and the jury commissioner shall obtain information as to suitable names. When they placed the names in the box, regardless of where they may have been obtained, they exercised judgment that the persons named were proper jurors. In order to comply with section 275 the clerk naturally turned to those whose qualifications as State jurors were known (R. 31, 32). He put names in the jury box of men that he knew personally and of others that were suggested to him (R. 32).

This matter, again, is not of substance. No prejudice to the defendants is shown or hinted at. It is not alleged that the jurors selected were not properly qualified. Since the point is raised for the first time upon writ of error, section 1025, R. S., is of especial force.

## II.

### **THE INDICTMENT WAS REGULARLY FOUND AND WAS SUFFICIENT IN FORM.**

#### **1. The motion to quash was properly denied.**

We pass to the alleged error in refusing to quash the indictment specification 7. Seven grounds are relied upon (brief, p. 11).

A motion to quash is an appeal to the discretion of the trial court. *Durland v. United States*, 161 U. S. 306, 314; *Holt v. United States*, 218 U. S. 245. It is a

preliminary motion refused except in the clearest cases. *United States v. Rosenburgh*, 7 Wall. 580, 583.

The various grounds of the motion to quash in this case are not calculated to appeal favorably to those charged with the administration of justice.

1. The first ground is (brief, p. 11):

The grand jury presented the indictment without these defendants having been charged with the offense upon oath or affirmation, and without any proper testimony having been presented to said grand jury or any witnesses sworn in a particular case.

So far as this is made one of the grounds of the plea in abatement (brief, pp. 11, 12), the plea is here considered.

If it is meant that the grand jury were not sworn, the contrary appears. The indictment states (R. 1):

The grand jurors \* \* \* empaneled and sworn \* \* \* upon their oath present \* \* \*.

And this is sufficient showing that the oath was properly taken. *Powers v. United States*, 223 U. S. 303, 312.

If it is meant that no sworn charge was presented to the grand jury (apparently so, see assignment 22 R. 192), this is not necessary. *Frisbie v. United States*, 157 U. S. 160, 163. In *Hale v. Henkel*, 201 U. S. 43, 59, 60, it was held that the grand jury may proceed without the formality of a written charge.

As to the evidence and the witnesses before the grand jury, the pleadings tendered are not sufficient.

It is not alleged that there was no evidence and that no witnesses were sworn. It is averred merely that there were no testimony and witnesses "in a particular case." If it had been intended to allege that no evidence and no sworn witnesses whatsoever were presented, the words "in a particular case" would not have been added.

But the grand jury may investigate generally. Particularity is usually the end, not the beginning of their proceedings. *Hendricks v. United States*, 223 U. S. 178, 184. In the present case, the grand jury was a special body, investigating violations of the Draft Act (R. 17).

It may be urged that counsel intended to allege that the witnesses were not sworn in a particular case, and that no proper testimony was presented to the grand jury at all. If a comma had been placed after the words "without any proper testimony having been presented to said grand jury," strength might be lent to such contention. But although the comma appears in the proffered plea (R. 17, 195, Brief, p. 12), counsel evidently regard it as immaterial, for it is omitted in the motion to quash, where precisely the same phraseology is used (R. 13, Brief, p. 11), and in the amended assignments of error (R. 192).

"Strict exactness" is required in dilatory pleadings of this sort. *Agnew v. United States*, 165 U. S. 36, 44. The allegations must be taken most strongly against the pleader.

Assume, for the sake of argument, that the motion and plea state that the grand jury presented the indictment "without any proper testimony having been presented" at all. It is not said that no testimony was presented. That this was not intended is clear from the plea, which states "without any testimony having been presented to said grand jury of a nature proper for such grand jury to receive" (R. 17). Wherein does the impropriety of the testimony consist? Was the evidence competent, but improperly obtained? See *Hillman v. United States*, 192 Fed. 264; certiorari denied, 225 U. S. 699. Was it competent, but weak? See *Holt v. United States*, 218 U. S. 245. The facts from which impropriety might be concluded are not revealed. No offer was made to prove the facts. Indeed, the validity of the ground alleged is stated in the motion to quash to be "apparent upon the face of the record" (R. 12), and nothing new is alleged to have been discovered when the plea in abatement was offered on the same day (R. 45).

The pleadings assert a pure conclusion of law. Some showing of facts at least is required before the presumption of the regularity of grand jury proceedings is overcome. We need not recur therefore to the cases showing the abuses which would result from reexamination of the sufficiency of the evidence before the grand jury, and enforcing the general rule that such review can not be made. *Cobban v. United States*, 127 Fed. 713, 718, 721; *Radford v. United States*, 129 Fed. 49, 51; *McGregor v. United*

*States*, 134 Fed. 187, 192, 193; *McKinney v. United States*, 199 Fed. 25; *Hillman v. United States*, *supra*; *United States v. Thomas*, 145 Fed. 74, 75; *In re Kittle*, 180 Fed. 946, 947; especially where the plea is sworn to only on belief (R. 17). See *United States v. Nevin*, 199 Fed. 831, 836. A case similar to the one at bar is *Holt v. United States*, 218 U. S. 245, 247, 248.

*State v. Dailey*, 72 W. Va. 520, is squarely in point. In that case a writ of prohibition was granted against a trial judge to prevent the filing of a plea in abatement that the grand jury acted upon wholly illegal evidence. Many cases in the State courts are cited in the opinion.

2. The second ground of the motion to quash now relied on (brief, pp. 11, 19) is:

The failure of the indictment to state that Schue was a citizen or a male person not an alien enemy who had declared his intention to become a citizen.

Section 5 of the Selective Draft Law makes no exception such as here suggested. It requires "all male persons between the ages of 21 and 30, both inclusive, to be registered except officers and enlisted men of the Regular Army, Navy, and National Guard and Naval Militia while in the service of the United States." Schue was not one of the excepted classes (R. 61). If he had been, the indictment need not anticipate affirmative defenses.

Section 2, exempting alien enemies from the draft does not narrow section 5. An alien enemy is required to be enrolled, but not drafted.

3. The third ground of the motion to quash is that the indictment fails to state that the President's proclamation had been published prior to the commission of the offense. As we read the indictment, it states that Schue, on June 5, 1917, "was then and there required, by the Proclamation of the President of the United States dated May 18, 1917 \* \* \*"; that he refused to register "as in said Act provided and in said Proclamation appointed" (R. 2).

4. The fourth ground is not pressed in the argument.

5. The fifth is that the indictment "alleges three separate offenses in one count" (brief, pp. 11, 21).

Only one offense is charged, the failure of Schue to register. The acts of Ruthenberg, Wagenknecht, and Baker in inducing, aiding, counseling, commanding Schue, do not constitute a separate crime. They are all principals in the commission of the one violation of law. Sec. 332, Criminal Code; *Connors v. United States*, 158 U. S. 408, 410, 411.

6. The next ground of the motion to quash is the alleged failure of the indictment to set forth the nature and cause of the accusation (brief, pp. 11, 22).

Defendants were fully advised by the indictment of the crime with which they were charged. They do not hint at surprise or difficulty in the preparation of their defense. They knew the speeches that

caused their arrests. Since they were not prejudiced in any way, the conviction must stand (R. S., sec. 1025). If they had desired more particularity they should have requested a bill of particulars. *Lamar v. United States*, 241 U. S. 103, 116, 117; *Bartell v. United States*, 227 U. S. 427, 432.

7. The last ground of the motion to quash is that the indictment charges defendants as accessories to a statutory misdemeanor (brief, pp. 11, 25).

It is not easy to catch the meaning of this specification. Defendants were indicted for procuring the commission of a violation of section 5 of the Selective Draft Law. They are not accessories, but principals in the commission of that crime. Sec. 332, Criminal Code.

**2. The court correctly refused to allow the proffered plea in abatement to be filed.**

The eighth specification of error refers to the refusal of the court in this regard (brief, p. 11).

The merits of the plea, which simply reiterated the grounds of the motion to quash, have already been considered, *supra*, pp. 99-105.

The plea, moreover, came too late. In *Agnew v. United States*, 165 U. S. 36, the indictment was returned December 12, plaintiff in error was arraigned December 17, and filed a plea in abatement on that day, alleging impropriety in the selection of the grand jury. This court held that the plea was properly refused, stating (p. 44):

\* \* \* certain rules may be regarded as generally applicable. One of these rules is

that the defendant must take the first opportunity in his power to make the objection. \* \* \* Another general rule is that for such irregularities as do not prejudice the defendant, he has no cause of complaint, and can take no exception.

(p. 45) \* \* \* \* The plea does not allege want of knowledge of threatened prosecution on the part of the defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before \* \* \*.

In *Hyde v. United States*, 225 U. S. 347, this court said (p. 373):

It is said in the *Agnew Case* that pleas in abatement on account of irregularities in selecting and impaneling a grand jury which did not relate to the competency of individual jurors must be pleaded with strict exactness and that a defendant must take the first opportunity in his power to make the objection. The indictment in that case was returned December 12, 1895; the plea in abatement was filed on the 17th of that month. It was held to have been filed too late.

In the present case the drawings of the grand and petit juries, respectively, were made pursuant to orders of the court, on June 16, 1917, and July 3, 1917 (R. 37, 38). The indictment was returned June 27 (R. 2). The challenge to the array of the grand jury and petit jury was filed on July 14 (R. 3). On July 17, the Government entered a general denial to the challenge (R. 11). The motion to quash and the plea in

abatement were not presented until July 18, or about three weeks after the indictment was returned (R. 45). No excuse for the delay is offered in either pleading.

**3. There was no error in overruling the demurrer to the indictment.**

The grounds of the demurrer have already been examined. (Specification of error 9.) (Brief, p. 12.)

**III.**

**THE COURT PROPERLY RULED OUT THE QUESTIONS PRO-POUNDED TO THE PETIT JURORS ON THEIR VOIR DIRE AS TO WHETHER THEY DISTINGUISHED BETWEEN ANARCHISTS AND SOCIALISTS.**

This is the subject matter of the last specification, 10 (brief, p. 12, 37).

In *Holt v. United States*, 218 U. S. 245, 248, this court said:

The finding of the trial court upon the strength of the juror's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds v. United States*, 98 U. S. 145. *Hopt v. Utah*, 120 U. S. 430. *Spies v. Illinois*, 123 U. S. 131.

In the present case the discretion of the lower court was not abused. How the juror's fitness would be affected is not shown. Possible prejudice against anarchists or socialists is not enough. See the *Connors* case, *supra*, p. 91.

In *Thiede v. Utah Territory*, 159 U. S. 510, a saloon keeper was convicted of murder. A juror admitted on the *voir dire* that he was prejudiced against the saloon business. He was held competent. The court said (p. 516):

But the charge against the defendant, the matter to be tried, had no reference to the occupation in which he was engaged, and, therefore, a prejudice against such occupation is entirely immaterial. In *Spies v. Illinois*, 123 U. S. 131, a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror.

The *Spies* case is conclusive against the defendants on the present point. See 123 U. S. 172, 174, 176, 179.

No. 680.

**Louis Kramer and Morris Becker, plaintiffs in error,  
v. The United States.**

I.

**THE EVIDENCE WARRANTED THE CONVICTION.**

The indictment was for a conspiracy of Kramer, Becker, Walker, and Sternburg, to induce men of draft age not to register. Section 5, act of May 18, 1917; section 37, section 332 of the Criminal Code, act of March 4, 1909, c. 321, 35 Stat. 1088.

Walker was acquitted by the jury (R. 259), and Sternburg was discharged after a directed verdict (R. 241).

Evidence of the conspiracy on behalf of the Government was as follows: Kramer and Becker both testified that they were members of the No-Conscription League (R. 90, 105, 106, 108, 177). They attended its meetings (R. 201) and believed in its principles (R. 96, 102, 187). The purpose of the league was to resist conscription by all means in its power (R. 102), and to aid conscientious objectors who came in conflict with the Government (R. 266).

Becker and Kramer were members of a committee of the league formed to advertise a mass meeting proposed for Hunt's Point Palace on June 4, the eve of registration (R. 95, 105, 112, 196, 268). The committee agreed to hand out circulars announcing the

proposed meeting (Govt. Ex. 1, R. 16, 263) at a public gathering in Madison Square Garden on May 31, 1917 (R. 95, 105, 106, 110). Kramer and Becker repaired to the Madison Square Garden on the evening of May 31. They were seen talking together (R. 14). Both held bundles containing the advertising circulars (Govt. Ex. 1); also smaller circulars<sup>1</sup> containing the platform of the No-Conscription League (R. 19, Govt. Ex. 2, R. 264). The defendants were distributing both kinds of circulars (R. 15, 25, 35, 80, 117, 231). Kramer motioned with his hands as to the direction in which the bundles should be distributed (R. 14, 81). He seemed to be the boss of the committee work (R. 28, 85).

While Kramer was handing out pamphlets he was overheard to tell an unknown man not to register, that it would help the cause (R. 35, 36, 44, 82, 84).

The defendants were arrested on the spot (R. 53, 178), having still in their possession both classes of circulars (Kramer, R. 19, 37, 209, 228; Becker, R. 53, 54). While the officers were taking Kramer away he called to some one in the crowd to tell the chief (R. 53, 70).

Seven overt acts are charged: (1) On May 31, 1917, Kramer gave a leaflet entitled "No-Conscription" (Govt. Ex. II), signed by the No-Conscription League, to an unknown person, and requested him to refuse to register; (2) on May 31, 1917, Kramer

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<sup>1</sup> These circulars are the same as those introduced in the Goldman and Berkman case. Excerpts are printed *infra*, p. 114.

gave to one Finan a leaflet entitled "No-Conscription." "Mothers, Fathers, Sons—turn out to protest against conscription" (Govt. Ex. 1), and requested Finan to refuse to register; (3) Becker on May 31, 1917, gave to several unknown persons the latter leaflet; (4) Becker on May 31, 1917, had in his possession a number of pamphlets of the first title; overt acts 5, 6, and 7 are alleged to have been committed by Walker and Sternburg (R. 6, 7). Proof of commission of overt acts was ample. As to the first overt act charged see R. 35, 36, 43, 82, 84; as to the second see R. 16, 72; as to the third see R. 53, 96. The overt acts in themselves constitute proof of the character of the conspiracy.

The testimony for the defense consisted largely in a series of denials (see R. 261, 262). The charge of the court was fair (R. 243). The jury were entitled to believe the testimony of the Government's witnesses, and justly arrived at the verdict of guilty.

No. 702.

**Emma Goldman and Alexander Berkman, Plaintiffs  
in Error, v. United States.**

The brief for plaintiffs in error in this case presents two points in addition to the contention of unconstitutionality: (1) That the indictment is insufficient; (2) that there was no evidence of defendants' guilt.

I.

**THE INDICTMENT WAS SUFFICIENT.**

The indictment charged that the defendants, together with divers unknown persons, conspired to induce men of draft age not to register as required by section 5 of the act of May 18, 1917, Public No. 12, 65th Congress; section 37 and section 332 of the Criminal Code (35 Stat. 1088, c. 321). Five overt acts are charged (R. 2-6) and, as acts, admitted: (1) Emma Goldman on May 18 made a speech at a public meeting in the Harlem River Casino in New York (R. 137); (2) Berkman on June 1 published "The Blast," vol. 2, No. 5 (R. 55, 111, 171, 475); (3) on June 2 Miss Goldman gave to one Haggerty a copy of the June, 1917, issue of "Mother Earth" (R. 130, 132, 478); (4) Berkman delivered an address on June 4 at Hunt's Point Palace; and (5) Emma Goldman delivered a speech at the same time and place (R. 165, 421).

The indictment states a crime. It is not a necessary ingredient that the purpose of the conspiracy be consummated. There is no merit in point one.

## II.

### THE EVIDENCE OF GUILT WAS AMPLE.

Evidence on behalf of the Government tending to prove the conspiracy is as follows:

Defendants, if not the organizers, were active members and leading spirits of the No-Conscription League (R. 18, 19). The fact of the confederation between the two defendants and others is shown by their work in connection therewith. The organization was effected on May 9, 1917, at Miss Goldman's apartment, both defendants being present (R. 22, 23, 33). Plans were laid for the mass meeting of May 18 (R. 24). Further preliminary meetings of the inner circle were held on Wednesday evenings May 16 and 23 (R. 258, 343). Both defendants were present on May 16, when plans for the mass meeting of May 18 were perfected (R. 27, 63). Berkman presided over the group meeting of May 23 (R. 242), also held at Miss Goldman's apartment (R. 281), at which arrangements were made for the mass meeting of June 4. Miss Goldman being in Massachusetts at the time, sent a message purporting to give her stand on registration (R. 531).

The office of the league was in the same building in which the defendants had offices (R. 17). Berkman held the money collected (R. 42, 43, 47, 465); ordered and paid for thousands of circulars (R. 95,

96, 100, 103, 104); rented the Harlem River Casino for the mass meeting of May 18 (R. 28, 29, 454, 455).

The purpose of the league was, as its name implied, to work against conscription. A manifesto was issued May 25, 1917, announcing in part as follows (R. 453):

The No-Conscription League has been formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men. The No-Conscription League is to be the voice of protest against the coercion of conscientious objectors to participate in the war. Our platform may be summarized as follows:

We oppose conscription because we are internationalists, anti-militarists, and opposed to all wars waged by capitalistic governments.

We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight.

We believe that the militarization of America is an evil that far outweighs, in its anti-social and anti-libertarian effects, any good that may come from America's participation in the war.

We will resist conscription by every means in our power, and we will sustain those who, for similar reasons, refuse to be conscripted.

(R. 454) Resist conscription. Organize meetings. Join our League. Send us money. Help us to give assistance to those who come in conflict with the government. Help us

to publish literature against militarism and against conscription.

We consider this campaign of the utmost importance at the present time. Amid hateful, cowardly silence, a powerful voice and an all-embracing love are necessary to make the living dead shiver.

No-CONSCRIPTION LEAGUE,

20 East 125th St., New York.

In order to enlist as many as possible in the effort to resist "by every means in our power" and to "sustain those who, for similar reasons, refuse to be conscripted," large public mass meetings were arranged, at which direct appeals were made not to register. On May 18 at the Harlem River Casino mass meeting the defendant Goldman said in part (R. 138, 478):

We don't believe in conscription, this meeting to-night being a living proof. This meeting was arranged with limited means. So, friends, *we who have arranged the meeting* are well satisfied if we can only urge the people of entire New York City and America, there would be no war in the United States—there would be no conscription in the United States—(applause)—if the people are not given an opportunity to have their say.

(R. 482) Now, friends, do you suppose for one minute that this Government is big enough and strong enough and powerful enough to stop men who will not engage in the war because they don't want the war, because they don't believe in the war, because they are not going

to fight a war for Mr. Morgan? What is the Government going to do with them? They're going to lock them up. You haven't prisons enough to lock up all the people (applause).

(R. 483) How many people are going to refuse to conscript, and I say there are enough. I would count at least 50,000, and there are enough to be more, and they're not going to when only they're conscripted. They will not register (applause).

We are going to support all the men who will refuse to register and who will refuse to fight (applause). (See also R. 161, 404.)

We want you to fill out these slips and as you go out drop them into the baskets at the door. We want to know how many men and women of conscriptive age—and they're going to take women and not soldiers.

(R. 484) We will have a demonstration of all the people who will not be conscripted and who will not register. \* \* \*

I will say, in conclusion, that I, for one, am quite willing to take the consequences of every word I said and am going to say on the stand I am taking. I am not afraid of prison—I have been there often.

(R. 485) So, friends, it is our decision to-night. We are going to fight for you, we are going to assist you and co-operate with you, and have the grandest demonstration this country has ever seen against militarism and war. What's your answer? Your answer to war must be a general strike, and then the governing class will have something on its hands. (See R. 161, 162, 410-415, 417—Ex. 61, 62, R. 513.)

This language is from the stenographic reports. There can be no doubt of its correctness. Two stenographers, neither of whom knew that the other was there, caught the same language, the notes and transcripts not being compared (R. 137, 138, 417).

On the eve of registration, June 4, at Hunt's Point Palace, another mass meeting was held (R. 71, 72). Many men of draft age were among the thousands present (R. 360). Both defendants made speeches, which were reported by a stenographer employed by defendants (R. 165, 487). The report is admittedly correct (R. 421). Berkman said in part (R. 487):

But we say further to you, if you believe in liberty, if you pretend to fight for liberty and democracy how can you force us to do what we don't want to do? (Great applause and cheering.)

(R. 489) Don't make light of it, because it is the most terrible and tragic moment in the life of the country. Conscription in a free country means the cemetery of liberty, and if conscription is the cemetery then registration is the undertaker. (Great applause and cheers and boos, and something thrown at the speaker that looked like a lemon.)

All right, I am talking now; you can talk later. (Some one in the gallery threw something at the speaker and said something the stenographer could not understand.) Those who want to register should certainly register, but those who know what liberty means, and I am sure there are thousands in this country,

they will not register. (Many hurrahs and great applause.) There have been many black days, many black Fridays, and black Sundays in the history of this country. \* \* \* But there is going to be a blacker day, not a black Friday, but a black Tuesday. (Great applause.) And I believe that those who realize the full significance of forcing a supposedly free country into an armed camp, those who realize that should put on mourning tomorrow.

At the same meeting the defendant Goldman said (R. 492):

We say that those who believe in war, believe in conscription and in militarism and should do their duty and fight. We have no objection against it, but we refuse to be compelled to fight when we don't believe in war and when we don't believe in militarism and when we don't believe in conscription. \* \* \*

(R. 494) Now, friends, I am here frankly and openly telling you that I will continue to work against Conscription.

\* \* \* Now friends, if I do not tell you tonight not to register, it is not because I am afraid of the soldiers, or because I am afraid of the police. I have only one life to give, and if my life is to be given for an ideal, for the liberation of the people, soldiers, help yourselves. My friends, the only reason that prevents me telling you men of conscriptable age not to register is because I am an Anarchist, and I do not believe in force morally or otherwise to induce you to do anything that is against your conscience, and that is

why I tell you to use your own judgment and rely upon your own conscience. It is the best guide in all the world. If that is a crime, if that is treason, I am willing to be shot.

(R. 497) Don't forget, friends, that the opposition to conscription only begins, it does not end tonight.

The direct purpose of the league to procure as many men as possible not to register is apparent from these speeches. It is also demonstrated by the appeal for support dated May 25, 1917, which contains the following (R. 138, 455, 456, 457):

(R. 456) \* \* \* There are thousands of men who will not under any circumstances allow themselves to be conscripted. \* \* \* Something must be done to sustain these men to whom the Ideal of Liberty and Human Solidarity is not a mere phrase, but a vital, living fact.

With that in view, we have organized the *No-Conscription League*. Its first public activity took place on Friday evening, May 18th—a mass meeting attended by 8,000 men and women who pledged their decision not to register or to be conscripted into killing.

This was sent out to thousands of persons whose names were furnished by the defendants. Letters to those on Berkman's list were signed "Alexander Berkman"; those on Miss Goldman's list were signed in her name. (R. 30-33, 37, 38, 458, 463.)

The theory of the defendants was that they directed their efforts against conscription yet did not give advice not to register, but refused to give such

advice (R. 204); that they advised that each should do as his judgment and conscience dictated<sup>1</sup> (R. 60, 209, 228, 232, 252, 531). This notion is still insisted upon in defendant's brief.

According to their own confession, therefore, they did not advise obedience to the law; but that the conscientious objector should disobey, if his judgment so dictated.

Grant that defendants did distinguish between conscription and registration, the result reasonably deduced from advice not to be conscripted is to refuse to take the first step. Defendants' witness, Lind, understood Miss Goldman to say at the meeting on June 4 that all conscientious objectors would be assisted by the No-Conscription League whether they got into difficulties from refusal to register or from refusal to obey orders after registration (R. 404, 405).

But defendant's own words demolish their theory. Both distinctly and expressly solicited refusal to register. On June 2 "The Blast" was published by Berkman, and on June 1 "Mother Earth" was issued by Miss Goldman. The June "Blast" contains the following (R. 475, 476):

#### REGISTRATION.

Registration is the first step of conscription. The war shouters and their prostitute press, bent on snaring you into the army, tell you

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<sup>1</sup>At the meeting of the esoteric on May 23, Attorney Weinberger spoke. In the group there was "appreciation expressed that advice not to register would land the person so advising in jail." (R. 287.)

that registration has nothing to do with conscription.

They lie.

Without registration, conscription is impossible.

\* \* \* \* \*

Every beginning is hard. But if the government can induce you to register, it will have little difficulty in putting over conscription.

By registering you wilfully supply the government with the information it needs to make conscription effective.

\* \* \* \* \*

(R. 477) The consistent, conscientious objector to human slaughter will neither register nor be conscripted.

ALEXANDER BERKMAN.

\* \* \* \* \*

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#### WAR DICTIONARY

ALEXANDER BERKMAN

Allies—The fairies of Democracy.

Conscription—Free men fighting against their will.

Liberty Bond—A bone from a bonehead.

Militarism—Christianity in action.

Patriotism—Hating your neighbor.

Registration—Funeral march of Liberty.

Trenches—Digging your own grave.

The June number of "Mother Earth," published and edited by Miss Goldman (R. 112-114, 170), also speaks to the point (R. 467-473):

(R. 470) What, then, is to be done?

We can decide for no one. We do not claim omniscience, nor the gift of prophecy.

But we can point out certain self evident truths. Draw from them your own conclusions and decide your course of action. \* \* \* There are no subtle distinctions made by liberty loving people in their objection to conscription in toto. Why, then, should there be no militant objection to the first integral part of it—REGISTRATION?

\* \* \* \* \*

Registration is literal and final in its meaning. *It is the first step over the precipice into the bottomless pit of conscription.* It is the first and only step necessary toward the establishment of an institution only comparable to the now extinct Third Section of Russia. It is the resignation of the rights of the individual to a militarily supervised government. It implies the abrogation of every instinct as well as any principle you may have against bearing arms. It means that you sanction and wilfully choose obedience and that you repudiate your right to resistance. \* \* \*

Do what your conscience dictates on June 5th and thereafter.

#### CONCLUSION.

The writs of error and the appeal should be dismissed or the several judgments of the courts below affirmed.

JOHN W. DAVIS,  
*Solicitor General.*

ROBERT SZOLD,  
*Attorney.*

DECEMBER, 1917.

## APPENDIX "A."

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### STATUTES REQUIRING MILITIA SERVICE PRIOR TO THE ADOPTION OF THE CONSTITUTION.

#### CONNECTICUT.

Book of Gen. Laws (Green 1673, p. 49).

Acts and Laws, 1702, p. 76.

Acts and Laws, 1715, p. 78.

Acts and Laws, 1733 (Green, Laws to 1772, p. 155).

Acts and Laws, 1755 (Green, Laws to 1772, p. 277).

Acts and Laws, 1756 (Green, Laws to 1772, p. 284).

Acts and Laws, 1772 (Green, Laws to 1772, p. 373).

Acts and Laws, 1784, p. 144.

#### DELAWARE.

Laws of New Castle, Kent, and Sussex upon Delaware, p. 171 (1741).

Acts 1746, c. 84, Acts (Bradford, 1752), p. 301.

Act June 4, 1785, Laws 1785, p. 57.

#### GEORGIA.

Act Sept. 29, 1773, Colonial Records (Candler), Vol. XIX, pt. 1, p. 291.

Act Jan. 24, 1755, Colonial Records (Candler), Vol. XVIII, p. 7.

April 24, 1760, Colonial Records (Candler), Vol. XVIII, p. 426.

Act November 15, 1778, Colonial Records of Ga. (Candler), Vol. XIX, pt. 2 (1774-1805), p. 103.

Act February 26, 1784, Colonial Records (Candler), Vol. XIX, pt. 2, p. 348.

#### MARYLAND.

Act June 3, 1715, c. 43.

Act June 8, 1719, c. 1.

Act Nov. 3, 1722, c. 15.

Act Apr. 12, 1733, c. 7.  
 Laws June, 1777, c. 17.  
 Laws Oct., 1777, c. 21.  
 Laws Oct., 1778, c. 10.  
 Laws June, 1780, c. 3.  
 Laws May, 1781, c. 15.  
 Laws Nov., 1783, c. 1.

## MASSACHUSETTS.

Act Nov. 22, 1693, c. 3, *Acts and Resolves, Province of Massachusetts Bay*, Vol. I, p. 128.

Act June 23, 1748, c. 7, *Acts, supra*, Vol. III, p. 420.  
 Act January 22, 1776, c. 10, *Acts, supra*, Vol. V, p. 445.  
 Act Nov. 14, 1776, c. 21, *Acts and Laws 1776-1780*, p. 89, *Acts and Resolves, Province of Massachusetts Bay*, v. 5, p. 595.  
 Act March 13, 1778, c. 24, *Acts, supra*, Vol. V, p. 778.  
 Resolve of June 12, 1778, c. 51, p. 13, May, 1778-Jan. 1781.  
 Resolve of June 30, 1781, c. 98, *Laws and Resolves of Massachusetts, 1780-81*, p. 674.  
 Act Mar. 3, 1781, *Laws of 1781*, c. 21, pp. 32.  
 Act Mar. 10, 1785, c. 55, *Perpetual Laws 1780 to 1789*, p. 338.

The following statutes provided for impressment into His Majesty's army—the statutes of 1758-9 for an expedition into Canada:

Act 1693-4, c. 4, *Acts, supra*, Vol. I, p. 133.  
 Act 1699-1700, c. 19, *Acts, supra*, Vol. I, p. 398.  
 Act 1702, c. 6, *Acts, supra*, Vol. I, p. 499.  
 Act 1724-25, c. 6, *Acts, supra*, Vol. II, p. 333.  
 Act 1744, c. 2, *Acts, supra*, Vol. III, p. 144.  
 Act 1748-9, c. 5, *Acts, supra*, Vol. III, p. 417.  
 Act 1753-4, c. 41, *Acts, supra*, Vol. III, p. 734.  
 Act 1755-6, c. 12, *Acts, supra*, Vol. III, p. 872.  
 Act 1756-7, c. 23, *Acts, supra*, Vol. III, p. 1024.  
 Act 1757-8, c. 34, *Acts, supra*, Vol. IV, p. 86.  
 Act 1758-9, c. 3, *Acts, supra*, Vol. IV, p. 157.  
 Act 1758-9, c. 21, *Acts, supra*, Vol. IV, p. 191

## NEW HAMPSHIRE.

Province Laws, 1688, c. 18, 1 Metcalf's ed., 221.

Province Laws, 1689, c. 49, 1 *id.*, 297.

Province Laws, 1689, c. 55, 1 *id.*, 299.

Province Laws, 1689, c. 98, 1 *id.*, 318.

Province Laws, 1689, c. 117, 1 *id.*, 324.

Province Laws, 1689, c. 119, 1 *id.*, 325.

Province Laws, 1689-90, c. 234, 1 *id.*, 371.

Province Laws, 1689-90, c. 243, 1 *id.*, 376.

Province Laws, 1689-90, c. 245, 1 *id.*, 377.

Province Laws, 1689-90, c. 249, 1 *id.*, 378.

Province Laws, 1690, c. 276, 1 *id.*, 395.

Province Laws, 1690, c. 30, 1 *id.*, 413.

Province Laws, 1690, c. 87, 1 *id.*, 314.

(The above laws were enacted during the period when New Hampshire and Massachusetts were joined under one government.)

Act Oct. 6, 1703, c. 1, 2 Metcalf's ed., 55.

Act May 14, 1718, c. 21, 2 *id.*, 284.

Act May 2, 1719, c. 14, 2 *id.*, 347.

Act Feb. 25, 1739-40, c. 4, 2 *id.*, 575.

Act Feb. 28, 1745-6, c. 8, 3 *id.*, 17.

Act Sept. 19, 1776, c. 3, Metcalf's ed., v. 4, p. 39.

Act of March 18, 1780, c. 12, Metcalf's ed. Laws N. H., v. 4, p. 273, 281.

## NEW JERSEY.

Act May 8, 1746, 1st sess., c. 200, Acts (Allinson, 1776), p. 139.

Act Dec. 21, 1771, 4th sess., c. 539, Acts (Allinson, 1776), p. 343.

Act March 15, 1777, c. 20, acts September, 1776, p. 26.

Act September 9, 1777, c. 44, acts September, 1777, p. 98.

Act June 2, 1779, c. 24, acts May, 1779, p. 58.

Act June 12, 1779, c. 44, acts May, 1779, p. 113.

## NEW YORK.

Act of Oct. 4, 1690, Colonial Laws of New York, 1664-1719, vol. 1, p. 219.

Act May 6, 1691, c. 5, Laws, *supra*, p. 231.

Act Oct. 18, 1701, c. 95, Laws, *supra*, p. 454.

Act Nov. 27, 1702, c. 114, Laws, *supra*, p. 500.

Act June 19, 1703, c. 135, Laws, *supra*, p. 546.

Act June 27, 1706, c. 157, Laws, *supra*, p. 591.

Act Sept. 18, 1708, c. 168, Laws, *supra*, p. 611.

Act Sept. 20, 1709, c. 193, Laws, *supra*, p. 675.

Act Nov. 24, 1711, c. 235, Laws, *supra*, p. 745.

Act Dec. 10, 1712, c. 258, Laws, *supra*, p. 778.

Act July 1, 1713, c. 260, Laws, *supra*, p. 781.

Act July 5, 1715, c. 296, Laws, *supra*, p. 868.

Act June 30, 1716, c. 315, Laws, *supra*, p. 887.

Act May 27, 1717, c. 334, Laws, *supra*, p. 917.

Act July 3, 1718, c. 357, Laws, *supra*, p. 1001.

Act November 19, 1720, c. 385, Colonial Laws of New York, 1720-1737, vol. 2, p. 1.

Act July 27, 1721, c. 419, Laws, *supra*, p. 84.

Act July 24, 1724, c. 448, Laws, *supra*, p. 187.

Act Aug. 31, 1728, c. 511, Laws, *supra*, p. 421.

Act Oct. 17, 1730, c. 553, Laws, *supra*, p. 657.

Act Sept. 30, 1731, c. 563, Laws, *supra*, p. 698.

Act October 14, 1732, c. 573, Laws, *supra*, p. 734.

Act November 1, 1733, c. 598, Laws, *supra*, p. 821.

Act Nov. 13, 1734, c. 617, Laws, *supra*, p. 858.

Act Nov. 8, 1735, c. 628, Laws, *supra*, p. 905.

Act Nov. 10, 1736, c. 637, Laws, *supra*, p. 922.

Act Dec. 16, 1737, c. 647, Laws, *supra*, p. 947.

Act Oct. 3, 1739, c. 674, Colonial Laws of New York, 1739-1755, vol. 3, p. 3.

Act Nov. 3, 1740, c. 694, Laws, *supra*, p. 69.

Act Nov. 27, 1741, c. 716, Laws, *supra*, p. 168.

Act Oct. 29, 1742, c. 730, Laws, *supra*, p. 224.

Act Dec. 17, 1743, c. 747, Laws, *supra*, p. 296.

Act Sept. 21, 1744, c. 771, Laws, *supra*, p. 385.

Act Nov. 29, 1745, c. 814, Laws, *supra*, p. 510.

Act Feb. 27, 1746, c. 816, Laws, *supra*, p. 511.

Act Dec. 6, 1746, c. 843, *Laws, supra*, p. 621.  
Act Sept. 22, 1747, c. 849, *Laws, supra*, p. 648.  
Act Dec. 12, 1753, c. 947, *Laws, supra*, p. 962.  
Act Dec. 7, 1754, c. 963, *Laws, supra*, p. 1016.  
Act Feb. 19, 1755, c. 972, *Laws, supra*, p. 1051.  
Act Feb. 19, 1756, c. 996, Colonial Laws of New York, 1755-1769, vol. 4, p. 16.  
Act Nov. 27, 1756, c. 1024, *Laws, supra*, p. 101.  
Act Feb. 26, 1757, c. 1042, *Laws, supra*, p. 178.  
Act Dec. 24, 1757, c. 1048, *Laws, supra*, p. 187.  
Act Dec. 16, 1758, c. 1070, *Laws, supra*, p. 293.  
Act Dec. 24, 1759, c. 1092, *Laws, supra*, p. 363.  
Act Nov. 8, 1760, c. 1128, *Laws, supra*, p. 475.  
Act Dec. 31, 1761, c. 1157, *Laws, supra*, p. 553.  
Act Dec. 11, 1762, c. 1186, *Laws, supra*, p. 636.  
Act Dec. 13, 1763, c. 1211, *Laws, supra*, p. 698.  
Act Oct. 20, 1764, c. 1241, *Laws, supra*, p. 767.  
Act Dec. 23, 1765, c. 1275, *Laws, supra*, p. 852.  
Act Dec. 19, 1766, c. 1303, *Laws, supra*, p. 915.  
Act Dec. 24, 1767, c. 1326, *Laws, supra*, p. 952.  
Act March 24, 1772, c. 1541, Colonial Laws of New York, 1769-1775, vol. 5, p. 342.  
Act April 1, 1775, c. 1700, *Laws, supra*, p. 732.  
Act Mar. 31, 1778, c. 22, Laws, 1777-84 (ed. 1886), vol. 1, p. 45.  
Act April 3, 1778, c. 33, *Laws, supra*, p. 62.  
Act March 13, 1779, c. 33, *Laws supra*, p. 136.  
Act October 9, 1779, c. 13, *Laws supra*, p. 157.  
Act March 11, 1780, c. 53, *Laws supra*, p. 232.  
Act March 11, 1780, c. 55, *Laws supra*, 3rd sess., p. 237.  
Act Sept. 29, 1780, *Laws supra*, 4th sess., c. 4, p. 295.  
Act March 10, 1781, c. 23, *Laws supra*, p. 336.  
Act July 1, 1781, *Laws supra*, p. 393, 4th sess., c. 60.  
Act Nov. 17, 1781, *Laws supra*, p. 410, 5th sess., c. 8.  
Act April 4, 1782, *Laws supra*, p. 440, 5th sess., c. 27.  
Act February 21, 1783, *Laws supra*, p. 529, 6th sess., c. 16.  
Act April 4, 1786, c. 25, vol. 2, *Laws*, (ed. 1886) p. 220.

## NORTH CAROLINA.

Laws 1715, c. 25, vol. 23 State Records, p. 29.  
 Laws 1746, c. 1, vol. 23 S. R., p. 244.  
 Laws 1760, c. 2, vol. 23 S. R., p. 518.  
 Laws 1764, c. 1, vol. 23 S. R., p. 596.  
 Laws April, 1777, c. 1, vol. 24 S. R., p. 1.  
 November, 1777, c. 15, c. 19, vol. 24 S. R., *supra*, pp. 113,  
 128.  
 April, 1778, third session, c. 1, vol. 24 S. R., *supra*,  
 p. 190; c. 2, p. 198.  
 May, 1779, first session, c. 1, vol. 24 S. R., *supra*, p. 254.  
 Laws 1780, c. 24, vol. 24 S. R., p. 335.  
 Laws 1780, third session, c. 1, vol. 24 S. R., p. 358.  
 Laws 1781, first session, c. 1, vol. 24, S. R., p. 384.  
 Laws 1781, c. 10, vol. 24, S. R., p. 404.  
 Laws 1785, c. 1, vol. 24 S. R., p. 711.  
 Laws 1786, c. 22, vol. 24 S. R., p. 813.

## PENNSYLVANIA.

Resolve, Sept. 14, 1776, v. 9, St. L., p. 567.  
 Act Feb. 14, 1777, c. 742, v. 9 St. L., p. 49 (see opinion of  
 Judge Read in *Kneedler v. Lane*, 45 Pa. St., 286).  
 Act March 17, 1777, c. 750, v. 9 St. L., p. 75.  
 Act Dec. 30, 1777, c. 781, v. 9 St. L., p. 185  
 Act April 5, 1779, c. 843, v. 9 St. L., p. 381.  
 Act October 10, 1779, c. 865, v. 9 St. L., p. 440.  
 Act March 20, 1780, v. 10 St. L., c. 92, pp. 144, 156-7.  
 Act Sept. 28, 1781, v. 10 St. L., c. 950, p. 361.  
 Act March 21, 1783, c. 1022, 11 St. L., p. 91.  
 Act Sept. 22, 1783, c. 1038, 11 St. L., p. 161.  
 Act March 22, 1788, c. 1339, v. 13 St. L., p. 41.

## RHODE ISLAND.

Act May 19, 1647, 1 Colonial Records, 153.  
 Act May 13, 1665, 2 *id.* 115.  
 Act Aug. 13, 1673, 2 *id.* 495, 498; Laws 1673, p. 49  
 Act June 30, 1676, 2 *id.* 549.  
 Act May 1, 1677, 2 *id.* 567.  
 Act May 7, 1701, 3 *id.* 430.

Act May 6, 1702, 3 *id.* 453, Laws 1702, p. 76.  
 Laws May, 1718, *id.* Franklin, 1730, p. 96.  
 Act June 14, 1726, 4 Colonial Records, p. 377.  
 Acts and Laws 1730, p. 90.  
 Acts and Laws 1744, p. 66.  
 Act. March 14, 1757, 6 Colonial Records, p. 34.  
 Act August 10, 1757, 6 *id.* 75.  
 Acts and Laws 1767, p. 179.  
 Laws, June, 1775, p. 78.  
 Act April 17, 1777, 8 Colonial Records, p. 197.  
 Laws, October, 1777, p. 14.  
 Laws, December, 1777, p. 10.  
 Laws, June, 1778, p. 10.  
 Laws, October, 1779, p. 29.  
 Laws, Feb., 1781, pp. 5-8.  
 Laws, May, 1781, 2d sess., p. 11.  
 Laws, Aug., 1781, p. 39.

## SOUTH CAROLINA.

Act Oct. 15, 1686, No. 30, 2 St. L. 15.  
 Act May 8, 1703, No. 206, 9 St. L. 617.  
 Act July 19, 1707, No. 270, 9 St. L. 625.  
 Act Sept. 2, 1721, No. 440, 9 St. L. 631.  
 Act May 30, 1734, No. 584, 9 St. L. 641.  
 Act April 3, 1739, No. 653, 9 St. L. 641.  
 Act June 13, 1747, No. 748, 9 St. L. 645.  
 Act March 28, 1778, No. 1076, 9 St. L. 666, 674, sec. 15.  
 Act Feb. 13, 1779, No. 1116, 4 St. L. 465.  
 Act Feb. 19, 1779, No. 1120, 4 St. L. 470.  
 Act Sept. 11, 1779, No. 1137, 4 St. L. 502.  
 Act Feb. 3, 1780, No. 1140, 4 St. L. 504.  
 Act Feb. 6, 1782, No. 1143, 4 St. L. 508.  
 Act Feb. 26, 1782, No. 1154, 9 St. L. 682.  
 Act March 17, 1783, No. 1188, 4 St. L. 567.  
 Act March 26, 1784, No. 1233, 9 St. L. 689.

## VIRGINIA.

October, 1705, 3 Hening's Va. Stat. L., p. 335; p. 362.  
May, 1723, 4 *id.*, p. 118.  
February, 1727, 4 *id.*, p. 197.  
November, 1738, 5 *id.*, p. 16.  
November, 1738, 5 *id.*, p. 81.  
October, 1748, 6 *id.*, p. 112.  
August, 1755, 6 *id.*, p. 521.  
August, 1755, 6 *id.*, p. 530.  
March, 1756, 7 *id.*, pp. 9, 14.  
March, 1756, 7 *id.*, p. 26, 31.  
April, 1757, 7 *id.*, p. 93.  
April, 1757, 7 *id.*, p. 106.  
February, 1759, 7 *id.*, pp. 274-275  
November, 1762, 7 *id.*, p. 536.  
November, 1766, 8 *id.*, p. 241.  
July, 1771, 8 *id.*, p. 503.  
July, 1775, c. 1, 9 Hening's St. L., p. 9.  
December, 1775, c. 1, 9 Hening's, pp. 75, 89.  
May, 1776, c. 12, 9 Hening's, p. 139.  
May, 1777, c. 1, 9 Hening's, p. 267.  
May, 1777, c. 7, 9 Hening's, p. 291.  
May, 1781, c. 8, 10 Hening's, pp. 416, 421.  
October, 1784, c. 28, 11 Hening's, p. 475.  
October, 1785, c. 1, 12 Hening's, p. 9.

## APPENDIX "B."

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### DRAFT ACTS OF THE ORIGINAL STATES TO RECRUIT THE CONTINENTAL ARMY.

#### GEORGIA.

Act Aug. 5, 1782, Colonial Records, ed. Candler, v. 19, pt. 2, p. 155.

#### MARYLAND.

Laws March, 1778, c. 5, secs. 6 and 15.

Act Oct. 1780, c. 33, sec. 2.

Act Oct. 1780, c. 43, secs. 6 and 19.

Act May, 1781, c. 15, sec. 7.

Act Nov. 1781, c. 28, secs. 14 to 16.

#### MASSACHUSETTS.

Resolve June 16, 1781, c. 38, Laws and Resolves, 1780-1781, p. 621.

#### NEW HAMPSHIRE.

Act January 18, 1777, c. 5, Metcalf's ed. vol. 4, Laws, p. 77.

Act of June 26, 1779, c. 10, Laws, *supra*, p. 219.

Act June 16, 1780, c. 3, Laws, *supra*, p. 293.

Act June 27, 1780, c. 13; Laws, *supra*, 304.

#### NEW YORK.

Act April 1, 1778, c. 28, Laws of N. Y. v. 1, 1777-1784, p. 51.

Act of March 13, 1779, c. 33, Laws *supra*, p. 136, 137.

Act of July 1, 1780, c. 78, Laws *supra*, p. 284.

Act of July 1, 1781, 4th sess. c. 60, Laws *supra*, p. 393.

Act Mar. 23, 1782, 5th sess. c. 22, Laws *supra*, p. 433.

## NORTH CAROLINA.

Laws November, 1777, c. 19, State Records, vol. 24, p. 128.

Laws of April, 1778, 1st sess., c. 1, State Records, vol. 24, p. 154.

Laws of November, 1779, c. 1, State Records, vol. 24, p. 262.

Laws 1781, c. 1, State Records, vol. 24, p. 362; c. 10, State Records, vol. 24, p. 404.

## RHODE ISLAND.

Act July, 1780, 1st sess., pp. 6-10.

Act July, 1780, 2d sess., p. 27.

Act July, 1780, 2d sess., pp. 28-34.

Act November, 1780, p. 35.

Act January, 1781, p. 15.

Act March, 1781, p. 41.

## SOUTH CAROLINA.

1778, v. 4, St. L., p. 410, No. 1075. Amended by act of October 9, 1778, No. 1103, 4 Stat. 453.

## VIRGINIA.

Act May, 1777, c. 2, 9 Hen. 276-277.

Act October, 1777, c. 1, 9 Hen. 338-341.

Act October, 1778, c. 45, 9 Hen. 588.

Act May, 1779, c. 19, 10 Hen. 82

Act October, 1779, c. 50, 10 Hen. 214.

Act May, 1780, c. 12, 10 Hen. 259.

Act October, 1780, c. 3, 10 Hen. 326, 333.

Act May, 1782, c. 3, 11 Hen. 14.

## APPENDIX "C."

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### STATUTES NOW IN FORCE IN THE STATES AND TERRITORIES IMPOSING COMPULSORY MILITIA SERVICE.

Statutes in the following States and Territories impose on the citizens thereof between the ages of 18 and 45 liability to service in the respective militias either by draft or otherwise.

Alaska, 31 Stat., 321, 322, c. 786, sec. 2.

Arkansas, Kirby & Castle Digest, 1916, c. 121, secs. 6234, 6235, 6240, pp. 1484, 1485.

California, Kerr's Cum. Supp., 1906-1913, secs. 1897, 1906, 1917, pp. 245, 247-8.

Connecticut, Pub. Acts, 1917, act March 8, 1917, secs. 1, 3, 4, 5, pp. 2225-2226.

District of Columbia, 25 Stat., 772-3, c. 328, secs. 1, 5, act March 1, 1889.

Georgia, Laws 1916, secs. 5, 9, pp. 159-60.

Idaho, Session Laws 1909, Senate Bill No. 75, secs. 1, 2, 3, 47, pp. 342, 343, 357.

Illinois, Laws 1917, p. 784; see Laws 1909, act June 10, 1909, p. 437, sec. 3.

Iowa, Code 1897, secs. 2167, 2169, p. 770.

Kentucky, Acts 1916, c. 43, secs. 2, 7, 109, 118, pp. 437, 440, 472, 476-7.

Louisiana, Acts 1912, No. 191, sec. 1, p. 337; Acts 1915-16, No. 264, secs. 9, 70, pp. 542, 548.

Maine, R. S. 1916, c. 15, secs. 1, 2, 10, pp. 296-7, 299.

Maryland, Anno. Code, (Bagby), vol. 2, art. 65, secs. 1, 2, 8, pp. 1476, 1478.

Michigan, Howell's Mich. Stats., vol. 1, 2d Ed., secs. 1588, 1590, pp. 712, 714.

Minnesota, Sess. Laws 1916-17, c. 400, secs. 2, 7, pp. 587-8.

Mississippi, Laws 1916, c. 245, secs. 1, 3, p. 383.

Montana, Rev. Codes, Supp. 1915, secs. 1045a, 1054, pp. 163, 165.

Nebraska, R. S. 1913, c. 41, secs. 3899, 3904, 3913, 3915, pp. 1114-15, 1118, 1119.

Nevada, Rev. Laws 1912, vol. 1, secs. 3982, 3984, 3986, 3998, pp. 1156-7, 1159.

New Hampshire, Pub. Acts. & Res. 1917, c. 123, secs. 1, 6, 29, pp. 52, 53, 55.

New Jersey, Comp. Stat. 1709-1910, vol. 3, pp. 3347-8, secs. 1, 2, 8, 9.

New Mexico, Statutes 1915, secs. 3810-11, 3815-16, pp. 1114, 1116.

New York, Consol. Laws 1909, vol. 3, pp. 2468-9, 2471-2, secs. 1, 2, 8, 9; Laws 1916, 139th sess., vol. 3, c. 568, secs. 9, 9a, pp. 1862-3.

North Carolina, Laws 1917, c. 200, secs. 1, 46, 47, 48, pp. 351, 360-1.

North Dakota, Comp. Laws, 1913, v. 1, c. 35, secs. 2347-8, 2353-4, pp. 568-9.

Oklahoma, Rev. Laws 1910, vol. 1, c. 46, secs. 3898-3900, 3904, 3906, 3908, pp. 1015, 1017, 1018.

Oregon, Gen. Laws, 1917, c. 327, secs. 1, 3, 13, 88, pp. 654-5, 657, 680.

Rhode Island, Gen. Laws 1909, Title XL, secs. 1, 136, 138, pp. 1364, 1388-9.

South Carolina, Code 1912, vol. 1, secs. 490, 494, 495, pp. 174, 175.

South Dakota, Comp. Laws 1913, vol. 1, pp. 621-2, secs. 1-4.

Tennessee, Thompson's Shannon's Code 1917, vol. 1, secs. 643a-643a-5, pp. 296-298.

Utah, Laws 1917, c. 99, secs. 1, 2, 3, 18, 19, 20, pp. 289, 290, 295-6.

Vermont, Laws 1917, act March 3, 1917, No. 168, secs. 1, 47, pp. 176, 185.

Washington, Laws 1917, c. 107, secs. 1, 9, pp. 361, 364-5.

West Virginia, Code 1906, secs. 571-2, 574, pp. 229-30.

Wyoming, Session Laws 1917, act February 21, 1917, c. 107, secs. 1, 20, pp. 168, 174.

## APPENDIX "D."

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### **MONROE'S LETTER OF OCTOBER 17, 1814, ON THE DRAFT BILL.**

On October 17, 1814, Hon. James Monroe, then Secretary of War, addressed Hon. G. M. Troup, chairman of the Military Committee, House of Representatives, on the bill to increase the Military Establishment by draft. Excerpts from the letter, to be found in Niles' Weekly Register, vol. 7, page 137, are as follows:

Nor does there appear to be any well founded objection to the right in congress to adopt this plan (draft upon classes), or to its equality in its application to our fellow-citizens individually. Congress have a right, by the constitution, to raise regular armies, and no restraint is imposed in the exercise of it, except in the provisions which are intended to guard generally against the abuse of power, with none of which does this plan interfere. It is proposed, that it shall operate on all alike, that none shall be exempted from it except the chief magistrate of the United States, and the governors of the several states.

It would be absurd to suppose that congress could not carry this power into effect, otherwise than by accepting the voluntary service of individuals. It might happen that an army could not be raised in that mode, whence the power would have been granted in vain. The safety of the state might depend on such an army. Long continued invasions conducted by regular well disciplined troops, can best be repelled by troops kept constantly in the field, and equally well disciplined. Courage in an army is in a great measure mechanical. A small body well trained, accustomed to action, gallantly led on, often breaks three or four times the number of more respectable and more brave, but raw and undisciplined troops. The sense of danger is diminished by frequent exposure to it without harm; and confidence, even in the timid, is inspired in the knowledge that reliance may be placed on others, which can grow up only by service together. The grant to congress to raise armies was made with a knowledge of all these circumstances, and with the intention that it should take effect. The framers of the constitution, and the states who ratified it, knew the advantage

which an enemy might have over us, by regular forces, and intended to place their country on an equal footing.

The idea that the United States cannot raise a regular army in any other mode than by accepting the voluntary service of individuals, is believed to be repugnant to the uniform construction of all grants of power, and equally so to the first principles and leading objects of the federal compact. An unqualified grant of power gives the means necessary to carry it into effect. This is an universal maxim which admits of no exception. Equally true is it that the conservation of the state is a duty paramount to all others. The commonwealth has a right to the service of all its citizens, or rather, the citizens composing the commonwealth have a right collectively and individually to the service of each other, to repel any danger which may be menaced. The manner in which the service is to be apportioned among the citizens, and rendered by them, are objects of legislation. All that is to be dreaded in such case, is the abuse of power, and happily our constitution has provided ample security against that evil.

In support of this right in congress, the militia service affords a conclusive proof and striking example. The organization of the militia is an act of public authority, not a voluntary association. The service required must be performed by all, under penalties which delinquents pay. The generous and patriotic perform them cheerfully. In the alacrity with which the call of the government has been obeyed, and the cheerfulness with which the service has been performed throughout the United States by the great body of the militia, there is abundant cause to rejoice in the strength of our republican institutions, and in the virtue of the people.

The plan proposed is not more compulsive than the militia service, while it is free from most of the objections to it. The militia service calls from home for long terms whole districts of country. None can elude the call. Few can avoid the service, and those who do are compelled to pay great sums for substitutes. This plan fixes on no one personally, and opens to all who chose it a chance of declining the service. It is a principal object of this plan to engage in the defence of the state the unmarried and youthful, who can best defend it and best be spared, and to secure to those who render this important service, an adequate compensation from the voluntary contribution of the more wealthy in every class. Great confidence is entertained that such contribution will be made in time to avoid a draft. Indeed it is believed to be the necessary and inevitable tendency of this plan to produce that effect.

The limited power which the United States have in organizing the militia may be urged as an argument against their right to raise regular troops in the mode proposed. If any argument could be drawn from that circumstance, I should suppose that it would be in favor of an opposite conclusion. The power of the United States over the militia has been limited, and that for raising regular armies granted without limitation. There was, doubtless, some object in this arrangement. The fair inference seems to be, that it was made on great consideration, that the limitation in the first instance was intentional, the consequence of the unqualified grant of the second.

But it is said that by drawing the men from the militia service into the regular army, and putting them under regular officers, you violate a principle of the constitution which provides that the militia shall be commanded by their own officers. If this was the fact the conclusion would follow. But it is not the fact. The men are not drawn from the militia, but from the population of the country: when they enlist voluntarily, it is not as militia men that they act, but as citizens. If they are drafted it must be in the same sense. In both instances they are enrolled in the militia corps, but that, as is presumed, cannot prevent the voluntary act in one instance, or the compulsive in the other. The whole population of the United States within certain ages belong to these corps. If the United States could not form regular armies from them they could raise none. (pp. 139, 140.)

These plans (the draft) are thought more deserving the attention of the committee than any that have occurred. The first, for the reasons stated, is preferred. It is believed that it will be found more efficient against the enemy, less expensive to the public, and less burthensome on our fellow-citizens.

It has likewise the venerable sanction of our revolution. In that great struggle resort was had to this expedient for filling the ranks of our regular army, and with decisive effect.

It is not intended by these remarks, should the first plan be adopted, to dispense altogether with the service of the militia. Although the principal burthen of the war may thereby be taken from the militia, reliance must still be placed on them for important aids, especially in cases of sudden invasion. (pp. 140, 141.)

## APPENDIX "E."

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### ANCIENT ENGLISH STATUTES PROVIDING FOR MILITARY SERVICE.

1 Edward III, stat. 2, c. 5 (A. D. 1325), 1 Stat. L., England, pp. 415-416:

Item, the King will that no man from henceforth shall be charged to arm himself, otherwise than he was wont in the time of his predeceiters Kings of England; (2) and that no man be compelled to go out of his shire but where necessity requireth, and sudden coming of strange enemies into the realm; and that it shall be done as hath been used in times past for the defence of the realm.

1 Edward III, stat. 2, c. 7 (A. D. 1327), 1 Stat. L., England, p. 416:

Item, Whereas Commissions have been awarded to certain people of shires to prepare men of arms, and convey them to the King into Scotland or Gascoigne, or elsewhere, at the charge of the shires; (2) the King hath not before this time given any wages to the said preparers and conveyers, nor soldiers whom they have brought, whereby the commons of the counties have been at great charge, and much impoverished; (3) the King will that it shall be done so no more.

18 Edward III, stat. 2, c. 7, 2 Stat. L., England, p. 13 (A. D. 1344):

(4) And that men of arms, hoblers, and archers, chosen to go in the King's service out of England, shall be at the King's wages from the day that they depart out of the counties where they were chosen, till their return.

25 Edward III, stat. 5, c. 8 (A. D. 1350), 2 Stat. L., England, p. 55:

Item, it is accorded and assented, that no man shall be constrained to find men of arms, hoblers, nor archers, other than those which hold by such services, if it be not by common assent and grant made in parliament.

The Statutes 1 Edward 3, 18 Edward III, and 25 Edward III above were confirmed in 4 Henry IV, c. 13, 2 Stat. L., England, p. 434 (A. D. 1402).

16 Car. I, c. 28, 5 Stat. Realm, 138, entitled "An Act for the better raising and levying of Souldiers for the present defence of the Kingdoms of England and Ireland" (A. D. 1640).

Forasmuch as great Commotions and (Rebellions) have beene lately raised and stirred up in his Majesties Kingdome of Ireland by wicked plots and conspiracies of diverse of his Majesties Subjects there (being traiterously affected) to the great endangering not onely of the said Kingdome but alsoe of this Kingdom of England unlesse a speedy course be taken for the preventing thereof and for the raising and pressing of men for those services And Whereas by the Laws of this Realm none of his Majesties Subjects ought to be (impressed) or compelled to go out of his county to serve as a souldier in the Wars except in case of necessitie of the sudden coming in of strange enemies into the Kingdom or except they be otherwise bound by the tenure of theire lands or possessions Therefore in respect of the great and urgent necessity of providing a present supply of men for the preventing of these great and imminent dangers and for the speedie suppressing of the said hainous and dangerous Rebellions. Be it enacted by authority of this psent Parliament that the Justices of the Peace of every County and Riding within this Realm \* \* \* shall \* \* \* raise levie and impresse so many men (for) Souldiers Gunners and Chirrugins as shall be appointed by order of the Kings Majestie his heires or successors and both Houses of Parliament for the said services and to command all and every the high Constables \* \* \* to bring before them any such person or persons as shall be fit and necessary for the said services which said persons soe to be imprested as aforesaid and every of them shall have such imprest money \* \* \* and such other necessary charges and allowances shall be made touching the said presse the said money and other charges and allowances to be paid by such persons and in such manner as by order of his Majesty his heires and successors and of both Houses of Parliament shall be appointed And if any person or persons shall willfully refuse to be imprested for the said services that then it shall and may be lawfull to and for the said persons soe authorized as aforesaid to the said presse to commit such offender to prison. \* \* \*

